

FAMILY MEDIATION IN INTERNATIONAL FAMILY CONFLICTS: THE EUROPEAN CONTEXT

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Colophon

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INTRODUCTION

Context

This research report has been prepared in the framework of the project *Training in International Family Mediation (TIM)* implemented by Child Focus (Belgium) in cooperation with project partners Mediation bei internationalen Kindschaftskonflikten (MiKK e.V.) (Germany), Leuven Institute of Criminology (LINC) in the KU Leuven (Belgium) and associate partner Centrum Internationale Kinderontvoering (the Netherlands). The project was implemented during a period of two years lasting from July 2010 until June 2012.

The TIM project aimed at the creation of high standard training programmes in international family mediation and the establishment of a European network of trained international family mediators and trainers of family mediation. To contribute to this objective, a research analysis was done at the beginning of the project in order to define the landscape of international family mediation¹ in Europe. The research project was conducted by the Leuven Institute of Criminology (LINC), in KU Leuven (Belgium).

The research started by identifying and systematising data on potential informants and target groups, mainly national and international training institutes, mediation associations, mediators, and trainers working in the field of family mediation in Europe. The phase that followed was characterised by sending out questionnaires to training institutes, mediation associations, mediators, and trainers in Europe asking mainly information on various aspects of the application of mediation in family conflicts, and also on existing trainings, projects, programmes, networks, and other initiatives. The research helped in the identification and solicitation of the participant mediators and trainers in the trainings of the TIM project. Once the training of mediators was implemented, the researchers engaged in the thorough evaluation of the training by use of multiple evaluation methods. The results of the evaluation were

¹ For the scope of this research report, international family mediation means the use of mediation in *international family conflicts mainly where children are involved*.

key to developing further the training for trainers. The evaluation report is not included in this research report, but is available from Child Focus.

Structure and content

The research report is divided into five sections. The first four sections aim to set the stage in describing the concept of international conflicts family conflicts involving children and elaborate the potential of family mediation in such conflicts. The *first section* introduces the meaning of international family disputes, involving children, describing several key issues related to these disputes, such as parental responsibility, residence and contact, enforcement of court decisions, parental child abduction, and other issues. Next, the section focuses more in depth on the reasons leading to such conflicts, with a strong focus on parental child abduction, and on the effects of parental child abduction on children.

In the *second section*, we clarify very briefly some of the main terms used in alternative dispute resolution like negotiation, conciliation, facilitation, adjudication, arbitration, and mediation. The main aim is to make clear the differences of the different approaches with mediation. Secondly, we aim to describe family mediation generally, although there are many models . Finally, we focus on the advantages of using mediation in international family conflicts involving children.

The *third and fourth sections* will in addition highlight two key issues in the application of mediation in international family conflicts, involving children. The first issue is the debate around ‘involving’ children in the process of mediation and offers some recommendations on the matter based on empirical research results in various countries. The second issue is an analysis on the cultural challenge to international family mediation. We will conclude with a few recommendations and considerations on the matter.

Once we have defined the problem and clarified the terms used, we turn in the *fifth section* of the research report to family mediation in Europe which describes broadly the European context of family mediation. Thus, the first sub-section focuses on the European context, by describing the general development of family mediation in

Europe. The second sub-section traces family mediation through the lens of the European Union. In the third sub-section we describe the main models and modes of mediation in Europe. In the fourth sub-section we highlight the development of legislation, and in the fifth sub-section we describe the European training and mediation initiatives in Europe as they relate to international family mediation. Finally, the last sub-section, describes the EU Training in International Family Mediation project, especially in relation to the training and network that it led to.

1. INTERNATIONAL FAMILY DISPUTES, INVOLVING CHILDREN

1.1. Introduction

The revolution in travel and technology in the second half of the 20th century has turned the world into a far smaller place, increasing international mobility, cross-border migration, and diverse relationships between individuals of different nationalities, cultural and religious backgrounds, including marriages. Such relationships are often enriching for the families due to their international nature, however separation and divorce between mixed couples are increasingly resulting in cross border family conflicts involving children (Paul and Kiesewetter, 2011). While it has been documented that separation, divorce and conflicts between a couple can affect and impact negatively on families, especially children (Bohannon, 1971; Wallerstein and Kelly, 1980; Haynes, 1981; Kressel, 1985; Clulow, 1995), the impacts and effects of such events in international families can be paramount.

Separation of two parents of a common child involves the recognition that the relationship between the parents as parents, created by the very existence of their children, can never be altered by divorce or separation (Bohannon, 1971). This recognition requires further the working out of joint decisions, and finding ways and means of carrying out those decisions, which can be extremely difficult in the aftermath of the breakdown of personal relationships, when the potential for conflict is enormous (Kressel, 1985). As divorcing or separating parents become entangled in child related disputes they often lose sight of the best interests of their children. Especially when marriages or other types of unions between citizens of different countries or cultures and religions fail, a cultural, economic, social and legal clash is likely to follow when child related issues are involved, and as such entail new challenges and risks for children caught up in cross border situations (Starr, 1998).

Although there are no exact statistics available on the number of “cross-border” divorces and cases of international family conflicts involving children within the European Union, it is safe to say that a considerable number of citizens are affected.

As an example, approximately 15 per cent of the divorces pronounced in Germany each year (approximately 30.000 couples) concern couples of different nationalities².

There are several issues related to international family disputes involving children, including parental responsibility, residence and contact, enforcement of court decisions, and parental child abduction. These issues can be singular problems or co-exist in a given family dispute. Generally they are a result of divorce, separation or conflict between parents. Conflicts and disputes can be of various degrees, and the most problematic of all disputes - also defined as crime by some legislations -, which entails all the other issues that we will mention, is parental child abduction. In what follows, we will briefly highlight the main issues related to international family disputes involving children, and subsequently focus more in depth on the reasons leading to such conflicts, with a strong focus on parental child abduction.

1.2. Issues related to international family disputes involving children

Parental responsibility

Parental responsibility (also parental authority or guardianship, and sometimes equated also with child custody or custody rights) refers to the ensemble of rights and powers that the law (by judgment, by operation of law, or by an agreement having legal effects) grants to the father and the mother with respect to the person and the property of their children, in order for them to accomplish the duties of protection, education, and support that rest upon them.

This includes a responsibility to ensure that the child has shelter, food and clothes as well as a responsibility for the child's upbringing. It also includes the right to represent the child legally. The term thus encompasses not only rights of custody, but also rights of access and guardianship. Where an individual is a guardian of the child, the guardian has the right to take decisions in relation to the child's welfare and most importantly to decide where and with whom the child resides. Internationally, this

² The protection of children's rights within the European Union under the "New Brussels II Regulation"
Reference: MEMO/05/70 Date: 01/03/2005. Downloaded from
<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/70&type=HTML&aged=0&language=EN&guiLanguage=en> on 25 April 2012

has been interpreted widely, and a parent is regarded as possessing custodial rights if they have a residence or specific issues order in their favour which grants them responsibility for the child's daily care.

When parents are still together, the parental responsibility is usually joint and belongs to both parents together. This is also usually the case when parents are separated or divorced: they remain responsible together for the child, even if one parent has the main custody or residence over the child, and the other parent has a visitation right. In some cases, the court can grant exclusive parental authority to one parent, for example when the other parent is regarded as unfit to take care of the child and make decisions, or when the parent is considered a danger for the child. In those cases, the other parent can still have a right to contact, access or visitation with the child. Parental responsibility can become a huge problem in cases where the parents and the child are physically separated by distance, and where the parents have different nationalities and different legal systems apply.

Residence

Residence (also habitual residence or rights of custody) refers to the physical custody over the child, or to which parent the child lives with and for how long, in other words the effective center of the child's life. When parents are separated or divorced and no longer live together, the child usually has his main residence with one parent. The residential parent is the parent with whom the child is staying the majority of the time. The non-residential parent is the parent who has been granted joint custody of the child but with whom the child only resides for limited periods of time.

This term began to be used when joint custody or parental responsibility were implemented, since both parents have the custody of the child but, usually the child lives in the house of one of them the majority of his time. Residence is a very accentuated problem in international family conflicts involving children, because very often separating couples do not easily agree on the future residence of the child, given that it is very common for both parents to go back to their country of origin.

Contact

Contact (also rights of access or visitation right) refer usually to the right for child contact for the non-custodial parent. Child contact, when it becomes problematic, can be a highly contentious issue. This can arise, for example, where there is a failure to establish regular contact as a consequence of conflict or parental distress, or where there are serious concerns about a child's safety and well-being (Hunt and Roberts, 2004). Other practical factors can also create difficulties in the process of establishing and maintaining successful contact arrangements between children and non-resident parents – like housing, distance, financial hardship and working hours. It is not surprising, therefore, that findings suggest that access or contact generate even more contention than custody rights, because it is a continuing source of friction, requiring the parties to collaborate about their children arrangements over many years (James and Wilson, 1986; Kressel, 1985). Contact also generates great anxiety, particularly over child loss or the threat of loss (Murch, 1980), especially in cases when the parents are of different cultural background and the threat of child abduction remains high.

Enforcement of court decision

Enforcement of court decision refers to the obeying of the court decision by both parties on access, custody, and/or child or family support. If a party to a court order does not obey the court's order, the court can order them to appear before the court and show good reasons as to why they have not abided by the court's previous order. If the court is not satisfied with the reasons given for disobeying the court's order, it can then take further action including assessing fines, holding the party in contempt of court, or even mandating coercive measures, including imprisonment. Enforcement of court decisions can be much harder in separated international families, where members may live in different countries and follow different rules.

Other issues for dispute

Other issues for dispute can be differential parenting styles based on cultural differences, religious affiliation choice for the child, contact with extended families, school and career choice, gender-based decisions regarding the child, caretaking and

other child rearing practices, cultural and citizenship beliefs. Harkness and Super (1992) have developed the term 'parental ethnotheories' to help explain cultural differences in parenting. Ethnotheories are collective beliefs held by a cultural group about children's development and behaviour, and include expectations about the cognitive, social and emotional development of children. They derive from parents' cultural experiences within their community or reference group, and reflect cultural beliefs about children's development and characteristics of children that are valued by the society in which the child is being raised.

Culturally embedded beliefs and expectations are thought to give shape to the childrearing practices and other elements in the environmental context of the developing child. Specific examples of childrearing practices that are influenced by ethnotheories include the physical and social setting experienced by the child, such as the number of and people living in a household, and gender expectations. Even the child care arrangements that parents make for their children, such as whether a child is looked after by a member of the child's extended family or by an unrelated carer in a group care setting, basic care regimes such as sleeping arrangements, for example whether parents or siblings share their bed with the child or not, and feeding practices, with some parents encouraging independent feeding and others preferring to directly feed their children, the time parents spend in close physical contact with their child by carrying/holding them, and soothing them with close physical contact, are all likely to reflect the habits and customs of the parents' culture. We will say more on the cultural aspects in parenting in the section on the cultural challenge to international family mediation.

International parental child abduction

International parental child abduction can be defined as the wrongful removal of a child from the care of the person with whom the child normally lives. A broader definition encompasses the removal of a child from his/her environment, where the removal interferes with parental rights or right to contact. Removal in this context refers both to removal by parents or members of the extended family. More concretely, a definition of wrongful removal and retention in *The Convention on the*

Civil Aspects of International Child Abduction signed at the Hague on October 25, 1980, characterizes removal or detention wrongful in the following words:

“ The removal or the retention of a child is to be considered wrongful where:
(a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention;
and (b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention” (Article 3).

A frequent reaction of parents of different cultures when in conflict and pressure is often to return to one's family and country of origin together with their children. A study by Child Focus (2010) revealed that 60% of the abductors return to their home countries. If this is done without the approval of the other parent or permission from a court, a parent taking children from one country to another may, whether inadvertently or not, be committing child removal or international parental child abduction. These abductions arise out of a variety of circumstances, but they often involve clashes of cultural, religious, and social norms, as well as significantly divergent legal systems (Keshavjee, 2011). These potentially large differences, in addition to physical distance, make locating, recovering and returning internationally abducted children especially complex and problematic.

The same study also found that 50% of the children were 5 years old and younger, while more than 80% were 10 years old and younger. It is well known from the literature that most of the abducted children are between 0 and 5 years old. Research has found that every year there are more than 100.000 international parental child abductions worldwide, and that countries with the greatest volume of both incoming and outgoing applications under a multilateral international treaty are the USA, the UK, Canada, Germany, France and Mexico (Agopian, 1987). Statistics on child abduction cases can be found on the web-site of the Hague Conference on Private International law³. A statistical analysis of the application of the 1980 Hague Convention made in 1999 showed that hundreds of children were victims of abduction within the European Union each year.

³ www.hcch.net

The primary international instrument, intended to protect children from the harmful effects of their wrongful removal or retention across borders, is the *Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*. This multilateral treaty, to which 87 States are now party, does not seek to adjudicate on issues of custody, but gives effects to the principle that ordinarily an abducted child should be returned promptly to his/her home State. More specifically, the Hague Convention aims to

“...secure the prompt return of the children wrongfully removed to or retained in any Contracting State and ...to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting State”.

While there are many problems with the reliance on the Hague Convention only – and hence the reason for our project and the demand for international family mediation-, it can be easily said that one of the problems stemming from the Hague Convention is that it is virtually ineffective against a foreign citizen who has abducted a child to a foreign state which is not ‘signatory’. Unfortunately, many international child abductions have been to countries that will not hold the perpetrators accountable for any legal consequences for their actions. Many countries have not become part of the convention, for example Middle East countries⁴, in which cultural and religious norms have a tremendous influence on the determination of legal issues⁵.

Nevertheless, the only efficient way to fight against child abductions seems to be international and institutional cooperation on all levels. In the fifth section of the report we have brought together a series of developments within the EU countries on the matter, which have resulted in several programmes, projects, trainings, and networks, among which the EU Training in International Family Mediation project, which led to two main high standards European trainings and a major European network.

⁴ See Keshavjee (2011) for a detailed and well-informed consideration on the matter.

⁵ For example, one of the problems is that in these countries Muslim fathers have ultimate custody of children, whereas a mother’s right of custody dissipates when the child reaches the age of independence, which is seven for a son and nine for a daughter (Andrews, 2000). There is a clear tension between women’s rights and freedom of religion (Brandt and Kaplan, 1995-1996). Similarly, some of these nations do not recognize the ‘dual nationality’ of the child, and regardless of the mixed heritage, the child is considered to be a Muslim and to have the nationality of his father. Another problematic issue could be the fact that Islamic courts do not grant custody to parents who do not intend to raise their children as Muslims.

1.3. Causes of international parental child abduction

International parental child abduction has been attributed to many causes (Todd, 1995; Harper, 1995; Sapone, 2000; Janvier, McCormick and Donaldson, 1990; Long, Forehand, and Zogg, 1991; Sagatun and Barrett, 1990; Agopian, 1980, 1981; Johnston, Sagatun-Edwards, Blomquist, and Girdner, 1998; Greif and Hegar, 1993). One of the most frequently mentioned and discussed factor is the increase in the number of international marriages (Harper, 1995). This factor in combination with the ease in international travel, globalization, and telecommunications has added a new dimension to the problem of parental child abduction.

As mentioned before, cross national marriages can be based on different and often opposing cultural norms and religions. Consequently when this type of marriage breaks down, there is a risk of abduction for three main reasons: a) one party may abduct the children to their homeland in order to ensure that they are raised in accordance with the religion or the norms that conform their own; b) following the failure of the marriage, one party may be left in a foreign environment without support; c) furthermore, given that the child may have dual citizenship, he or she can be taken from one country to the other quite easily (Sapone, 2000).

Research has also indicated that there is a high correlation between incidents of child abduction and domestic violence (Sapone, 2000), albeit in two different directions. To many batterers, abducting the child is a further means of abusing the partner (Greif and Hegar, 1993). However, it has also been the case that the battered partner, which is usually the wife, abducts the child in order to escape to a place where emotional and familial support is available (Weiner, 2000).

In further research, Janvier, McCormick and Donaldson (1990) analysed responses from 65 left-behind parents. Abducting mothers tended to abduct domestically, while fathers cross borders. According to the left-behind parents, abductors were believed to have rarely acted alone, and in half of the cases to have made prior threats. The left behind parents tended to indicate that the abductors were impulsive, revengeful, manipulative, and controlling. They were described to have mental problems and

being products of dysfunctional families. About one quarter had abused drugs and alcohol, and domestic violence characterizes 60% of the pre-abduction relationships.

Greif and Hegar (1993) also gathered similar information about abductors by conducting interviews mainly with the left-behind parents, but also a few in-depth interviews with abductors. Half were described by the left-behind parents as having been raised in a home with a substance-abusing parent, one third had been physically abused, and one fifth had been sexually abused. At the time of the abduction, half of the abductors were said to have been unemployed, and over half the marriages were characterized by domestic violence. The reasons the left-behind parent gave for the abductions tended to focus on revenge motives, in order to hurt the left-behind parent. Less frequently given reasons, mainly from the abductors, included anger over the breakup, a desire to be with the child, pressure from others, dissatisfaction with visitation rights, and the new marriage or relationship of the parent left behind (Greif and Hegar, 1993).

In another study with interviews from a hot line of prevention of abduction, the parents who were considering abduction provided similar reasons: protection of the child, a desire to be with the child, the other parent's refusal to comply with the visitation order, and dissatisfaction with court ordered visitation (Long, Forehand, and Zogg, 1991). The parents who gave protection of the child as a reason, were concerned about emotional, physical and sexual abuse, and about the other parent's drugs and alcohol problems.

Sagatun and Barrett's (1990) research of 43 abductors concluded that abductions occur for very different reasons: the abducting parent wants revenge against the other parent, because s/he wishes to be pursued by the left-behind parent like during courtship, because the abducting parent has merged psychologically with the child to an unhealthy degree, and because of fear for the child's safety.

The literature therefore provides a portrait of abductors that is varied and complex. Left-behind parents frequently describe abductors as revengeful and angry, or as having many psychosocial problems while the few abductors who have been interviewed say that they abduct because they are concerned about themselves and

their children and find that the courts and their partners are unresponsive to their concerns.

The complex nature of these relationships suggests that parental abduction is not the result of one behaviour or factor but of a confluence of factors. The reasons for abduction tend to revolve around:

- fear for the child's safety and the perception that the child was being harmed
- unhappiness with the court decision concerning custody and visitation,
- reaction to the other parent's abduction-related threats and actions,
- reaction to domestic violence, drug and alcohol problems, including mental health problems
- revenge against the other parent and a desire to punish him/her,
- unresolved anger over the breakup,
- desire to be pursued by the left-behind parent like during courtship,
- merging psychologically with the child to an unhealthy degree,
- a desire to always be with the child,
- pressure from other members of extended family,
- anger over the new marriage or relationship of the left behind parent,
- abducting the children to one's own homeland in order to ensure that they are raised in accordance with one's own religion or norms,
- one parent is left in a foreign environment without support, feeling disenfranchised from the society, and separation and divorce intensify their sense of alienation,
- failing to value the other parent's relationship with the child.
- facilitating factors, like dual citizenship of the child, support from other family members, ability to travel, etc.

It appears that when enough risk factors of the ones mentioned above accumulate in a given family situation, including additional facilitating factors like dual citizenship of the child, support from other family members, ability to travel, then an abduction may occur.

When it comes to data regarding the gender of the abducting parent, research shows mixed results. In Italy for example, both parents are inclined to abduct, but fathers do it more frequently, because they have less chance to get custody after divorce. In fact,

in Italy judges often favour the mother in assigning the custody, without considering the option of shared custody⁶. Different data come from Belgium. The quantitative study of Child Focus in Belgium found out that 65% of the abductors were mothers.

Also contrary to the common popular belief according to which a non-custodial parent abducts the child during visits or holidays, in 80% of the cases, the child was abducted by the 'primary caretaker' (Child Focus, 2010; see also Lowe, Armstrong and Mathias, 2001). Similar data show that many typical cases (60 to 70 % of Hague Convention cases) involve abduction by the child's primary caretaker, usually their mother.

There seems to be an interesting link between the destination of the child and the sex of the abducting parent. According to the Child Focus study, mothers usually abduct their children to another EU country or to Asia, while father usually abduct to North Africa and the Middle East. Many of the results correspond to the findings of a similar research project done in Hungary⁷.

1.4 Effects of parental child abduction on children

Children who have been abducted have been the target of extensive research. Such research often documents very worrisome long lists of harmful effects of abduction on children. Some of the problems with children who are taken from their environment seem to be: they might not attend school, are left alone for long periods of time, receive inadequate medical care, and face neglect in terms of care, feeding, and psychological nurturing (Greif and Hegar, 1992). The abducting parent deprives the child not only of contact with the other parent but the child's accustomed and familiar surroundings (home, toys, school, neighborhood, community), as well as friends and family members. Because these children are typically very young, such gaps in their lives, even for a relatively short period of time, can be harmful to the child's emotional development (Greif and Hegar, 1992; Finkelhor, Hotaling, and Sedlak, 1991).

⁶ ISTAT figures in Italy show 91% to the mother, 6% to the father, 2% shared, and 1% other parties or institutions (cf. Redoglia, 2002).

⁷ Research project by Kék Vonal, a Hungarian non-governmental organisation (NGO) working with children's rights. This project was part of the Belgian one done in 2009–10 and also co-funded by the European Commission. The research report was not published.

Some of the physical and psychological effects stemming from abductions as identified broadly in the literature (see Agopian, 1984; Noble and Palmer, 1984; Freeman 1998, 2004; Schetky and Haller, 1983; Greif, 2000; Huntington, 1982; Hatcher, Barton, and Brooks, 1992; Senior, Gladstone, and Nurcombe, 1982; Finkelhor, Hotaling, and Sedlak, 1991). are:

- problems relating to trust and forming new relationships,
- developmental and intellectual problems,
- difficulty in finding an emotional equilibrium,
- anger against the victim parent (child thinks he has been abandoned by the victim parent),
- anger or total dependence on the abducting parent,
- eating problems,
- sleep troubles, nightmares and recurring dreams,
- fear of open windows and doors, and fear of abandonment,
- hostility and aggressive behavior,
- excessive affection and tendency to withdrawal, loneliness and isolation,
- regression to a motor and psychic condition like refusal to use the toilet, loss of bladder/bowel control, nocturnal enuresis, thumb sucking, clinging behavior
- disruption in identity formation,
- loss of stability and security,
- uncontrollable crying and mood swings,
- distrust of authority figures and relatives,
- distorted view of reality
- guilt and shame,
- low self-esteem
- scholastic troubles appear like learning and relationship difficulties, troubles in attending school again
- physical, sexual and emotional abuse
- attachment disorder, depression, learned helplessness, fear and phobias, stress and generalized anxiety disorder, acute stress disorder and post-traumatic stress disorder, alienation from parents, separation anxiety.

Even a long time after the abduction, children often continue to experience emotional and physical problems (Greif, 2000). Agopian's study (1984) found that the length of separation from the left-behind parent greatly influenced the emotional impact of the abduction experience on the abducted child. Generally, children held for shorter periods (less than a few weeks) did not develop intense negative effects.

In addition, and on a more complex level, an abducted child is exposed to a dynamic situation where the child may take on an inappropriate, more adult-like role, and become the protector or caretaker of the abductor. *Loyalty conflicts* between the left-behind parent and the abductor with whom the child may have identified seem to be very keen problems. Children tend to feel angry and confused by the behavior of both parents - towards the abductors for keeping them away from the other parent and their environment and towards the left behind parent for failing to 'rescue' or find them.

It is beyond doubt that the *lack of contact* between parents and children during the period of the abduction can be a source of immense and continuing anxiety for all those concerned. Where contact is denied between the child and the left-behind parent and family, it appears that more difficulties may be experienced by the child as doubts begin to enter the child's mind about the justification of being away from home and the well-being of the left-behind parent.

Terr (1983) reported that a sample of 18 children who had been abducted or experienced threats of abduction, showed symptoms of rage and grief toward the left behind parent, and suffering caused by *mental indoctrination* from the abducting parent. Mental indoctrination consists of specific training in how to be secretive in relation to hiding a sense of self, hiding accomplishments, distrusting authorities, being lied to about the left-behind parent, including being told that s/he has abandoned the child, doesn't love the child, or is dead. In addition it is the uncertainty and insecurity of their practical living arrangements and conflict between their parents that cause the most distress in children.

One of the common themes which emerged through the research findings with children's data, was the *difficulty in trusting* that they experienced after the

abduction. Children express this in terms of being unable to fully trust their parents or other adults in their lives, including those acting in a professional capacity (see Greif and Bowers, 2007). They describe losing trust in their parents (and other family members), in their belief that their environment was safe, and in law enforcement. The loss of trust continues into their adulthood and permeates to varying degrees their relationships with their siblings, partners, children, friends, and authority figures.

Two additional difficulties that abducted children face are *guilt and grief*. It is difficult to understand the *guilt* that is felt by a victim. Literature on divorce is full of references to children feeling that they had brought about difficulties between their parents and were responsible for the separation of the family. The guilt of abducted children is similar:

"[T]hese children are extremely guilty when they return and are very fearful of the reaction of the other parent. They do not know who to believe, they are bewildered and very fearful. Many children have a sense that the stealing was their fault and that it could have been avoided. They feel to blame for both the stealing and for the divorce. Many of the older children feel very guilty about not having tried to contact the parent victim. These children feel it is not possible to have a relationship with both parents, and they are torn between them. It is not uncommon to see total confusion when they are returned, particularly with a sense of being returned to a stranger" (Huntington, 1982:8).

Siegelman (1983), an expert on *grief*, says that change is upsetting in general, but in abduction cases in particular, because we are leaving a part of ourselves behind. Any change involves loss of the known and familiar reality that has contributed to consistency in one's life. Similarly, Elizabeth Kubler-Ross (2005), a major expert on grief, suggests that the second most intense life stress (second to death), is divorce or loss of a love relationship, where 'love relationship' applies broadly to all familial relationships. Besides, not only does an abducted child experience the physical distancing and loss of a parent, but the child may also be led to believe the parent is dead and with the death of a parent, generally comes loss of attachment, history, and roots (Faulkner, 1999).

While assistance from personal support systems -- family and friends -- is an important factor in recovering from a loss, support for such losses is likely to be

especially weak when one lives away from family and friends. An abducted child has lost most, if not all support systems. So, 'added to the abducted child's long list of challenges, problems, stressors, and confusions, -- is grief, grief for the absent parent, for a life that no longer exists, for friends and loved ones, and for the certainty and comfort of life as it was' (Faulkner, 1999).

2. ALTERNATIVE DISPUTE RESOLUTION OF FAMILY CONFLICTS

2.1. Introduction

There has been an increasing understanding and acceptance of the fact that the traditional adversarial system does not meet the needs of children and families in conflict. Since the 1980s other alternative approaches have been developed to deal with relationships during post separation and divorce (Emery, Sbarra and Grover, 2005; Irving, 1980; Kelly, 2002), commonly referred to as alternative dispute resolution processes. They fall on a continuum from simple negotiations between the parents at one end of the spectrum to litigating the dispute at the other end.

The ways people resolve disputes or make decisions about them are either consensual, adjudicative, or legislative in nature. The so-called "hybrid" processes, combine features of these approaches. Consensual dispute resolution means that the disputants themselves decide the process and the outcome, and such processes include negotiation, mediation⁸, facilitation, and conciliation. Adjudicative dispute resolution means that a third-party makes a binding decision for the parties, and these approaches include arbitration and court adjudication. Legislative approaches to dispute resolution focus on rule-making by a group, organization, or formal legislative body (Morris, 2002).

Mainstream responses to international family disputes involving children include, according to the issue at hand, legal approaches such as application of national family law and international regulations-based civil proceedings. In most cases partners consult their lawyers who negotiate on their clients' behalf in order to reach an agreement. If negotiation is not possible, they hand over to a judge the responsibility of decision-making, which is in turn imposed on the parties. Nevertheless, there has recently been an increased attention to the advantages of using consensual dispute resolution processes (such as mediation) in these cases.

⁸ Decision-making capacity is what has distinguished mediation both from other forms of dispute resolution and from other forms of professional intervention (Lukes, 1973).

In this section we will first clarify very briefly some of the main terms used in the field of alternative dispute resolution. The aim is to clarify the differences between various approaches and mediation. Secondly we aim to describe family mediation generally, although there are many models and styles (see sub-section 5.4. of mediation models in Europe). Finally we focus on the advantages of using mediation in international family conflicts involving children.

2.2. Approaches of alternative dispute resolution

Negotiation

Negotiation is a process in which two or more participants attempt to reach a joint decision on matters of common concern in situations where they are in disagreement or conflict. Unlike mediation, negotiation does not require the participation of a neutral third party. Instead, the parties themselves have the responsibility for deciding the terms of any resolution. Negotiation is voluntary, in the sense that disputing parties are not obliged to negotiate with each other. The process of negotiation is informal and without defined procedures about the presentation of arguments. If resolution in negotiation is reached, the settlement is not subject to a judicial review, but the settlement agreement can subsequently be enforced as a contract. The negotiation process itself is not open to the public.

Conciliation

Conciliation is another dispute resolution process that involves building a positive relationship between the parties in dispute. Conciliation is a method employed in some of the civil law countries, like Italy, France and Spain, where it is a more common concept than mediation. Although frequently used interchangeably with mediation, it is fundamentally different in several respects. The conciliator is an impartial person who assists the parties by driving their negotiations and directing them towards an agreement. In conciliation, the conciliator plays a direct role in the actual resolution of a dispute by advising the parties and making concrete proposals for settlement. The parties come to the conciliator seeking guidance and the parties make decisions about proposals made by conciliators. In this regard, the role of a

conciliator is distinct from the role of a mediator, who at all times maintains his or her neutrality and impartiality (Sgubini, Friediti, and Marighetto, 2004).

These concepts are sometimes used as synonyms, but they do indeed vary substantially in their procedures. In mediation, the mediator keeps control on the process through the use of different and specific stages like introduction, joint session, caucus, and agreement, while the parties control the outcome. By contrast, in conciliation the conciliator does not follow a structured process, but instead conducts the conciliation process as a traditional negotiation, which may take different forms depending on the case.

The other difference is that conciliation on the one hand is used almost preventively, as soon as a dispute or misunderstanding surfaces a conciliator pushes to stop a substantial conflict from developing. Mediation on the other hand, intervenes in a substantial dispute that has already surfaced and which has become difficult to resolve without professional assistance. The parties approach mediation as an alternative method to resolve their dispute, because they both recognise the fact that the conflict has grown potentially serious. Mediation may be used, however, any time after the emergence of a dispute, including the early stages.

Facilitation

Facilitation is a process by which a third party helps to coordinate the activities of a group, acts as a process facilitator during meetings, or helps a group prevent or manage tension and move productively toward decisions. The facilitation role can be placed on a continuum from simple group coordination and meeting management to intensive multi-party dispute mediation. Facilitation is voluntary and not a public process.

Often, in various models of restorative justice (RJ), like family group conferencing and peace-making or sentencing circles, the term facilitator is used instead of the term mediator, to emphasise the reduced power allocated to this figure in the decision-making process.

Adjudication

Adjudication generally refers to processes of decision making that involve a neutral third party with the authority to determine a binding resolution through some form of judgment. Adjudication is carried out in various forms (for example, outside the court system in the form of alternative dispute resolution processes such as arbitration), but most commonly occurs in the court system. The parties present their case to the adjudicator whose role is to weigh the facts presented and make a decision based on legal norms, that is final, binding and enforceable.

Adjudication is an involuntary process, in the sense that a court has the power to coerce a defendant into either participating in the process or face the consequences of a default judgment. The judicial proceedings are highly structured, with formal rules characterising the trial – for example, what counts as facts, the order in which facts are presented and how arguments are framed. The trial judge's decisions are binding on the parties, subject to appeal to a higher court. Adjudication is a public process, whereby the judge is a public official, and the proceedings are open to the public.

Arbitration

Arbitration refers to a method where the disputing parties involved present their disagreement to one arbitrator or a panel of private, independent and professional arbitrators. Unlike a judge, who is a public official, the arbitrator is typically a private person chosen by the parties. The person chosen to arbitrate the dispute often has specialised expertise in the subject matter of the dispute. Rules of presenting the facts and procedures are more relaxed than the rules of court. Arbitration can also be ordered by a court, whereby the arbitrator is appointed by a judge or government official.

An arbitrator has limited jurisdiction that is mainly determined by the construction of the relevant arbitration agreement. A dispute that might otherwise go to court becomes subject to binding arbitration by the agreement of the parties. In this sense, arbitration depends on a contract. Thus, the process is adjudicative, or determinative but not binding or enforceable, unless ordered by a court.

Mediation

Mediation is a process in which a neutral and impartial third party, the mediator, helps disputants resolve a dispute. The mediator's goal is to facilitate dialogue and negotiation and help the parties themselves to reach a mutually acceptable agreement. Mediation is typically a voluntary process where the parties themselves may choose the person who will act as their mediator. It is private and confidential, and not open to the public. Mediation is a flexible, but nevertheless structured process with a number of procedural stages and a specific set of protocols.

The mediator has no stake in the dispute and is not identified with any of the competing interests involved. The mediator has no power to impose a settlement on the parties, who retain until the end the right to make their own decisions. The main aim of mediation is to assist people in the creation of voluntary, functional and lasting agreements. In mediation, the parties also have the right to stop anytime and refer a dispute to the court system or arbitration. If parties are able to resolve their dispute by reaching a mediated agreement, that agreement can subsequently be made enforceable as a contract.

The actual practices of individual mediators vary greatly. While most mediators spend at least some time working with the parties together, practices vary concerning private and separate meetings with the parts. The practices of mediators vary along other dimensions as well. For example, some mediators encourage the participation of lawyers, while others aim to minimize their participation. Some mediators focus the process primarily on the strengths and weaknesses of each party's legal positions; others, primarily on the underlying interests and needs of the parties, trying to avoid discussion of the legal interests. Some mediators evaluate the legal strengths of each party's positions, and willingly express a view of the probable outcome in court. Other mediators avoid evaluation, and instead see their role as facilitation, trying to help the parties generate creative options that serve underlying interests⁹.

⁹ For more on the differences see sub-section 5.4. on mediation models.

2.3. The advantages of mediating international family conflicts¹⁰

When communication is obstructed between the parents and makes it impossible to find a solution to the existing conflict, mediation may facilitate a reasonable and sustainable agreement that serves the best interest of the child. Mediation can be fruitful mainly if it is fully voluntary and if the resolution of the conflict is important to both parties. Trained mediators use appropriate techniques and skills to open up or improve difficult or obstructed dialogue between disputants.

The use of mediation in cross-border family disputes is growing. There has been, and continues to be, much enthusiasm for the development of the mediation in the field of international child abduction. Different languages, different cultures and geographical distance add new dimensions that need to be taken into account when considering the methodology of mediation. Mediation has also proved to be a successful and effective method of settlement of family conflicts resulting in the abduction of the child, mainly because it can facilitate the voluntary and peaceful return of the child as well as reaching a long-term agreement on the residence of the child and on access rights after the return of the child. The positive benefits of mediated agreements over judicial decisions have been thus widely voiced mainly by practitioners but also researchers and policy makers (Paul and Kiesewetter, 2011).

There is generally consensus that mediation offers a number of advantages over adversarial legal approaches to the resolution of family disputes, particularly where children are concerned. The adversary mode of traditional western legal systems encourages competitive rather than cooperative attitudes. Communication through third parties (lawyers, judges), the translation of everyday language into legal discourse, the transformation of the client's objectives into legal categories, the win/lose nature of the court judgment are processes that impede a search for truth, free expression, and a lasting solution (Gilligan, 1982).

The process of mediation, in comparison, can facilitate direct communication and confidentiality of exchange both of which are more likely to reduce conflict and nurture long lasting cooperation. The mediation process *aims to avoid further*

¹⁰ The whole section is based on the book "Mediation in Family Disputes" (2008) by Marian Roberts

complication of the dispute and animosity between the parties, whereby a mediator actively uses specialised communication and negotiation skills and techniques to guide the parties towards a mutually beneficial agreement.

The *parties can learn how to negotiate more effectively together*, and therefore, manage future differences or misunderstandings better in the long run, modifying or making new arrangements in accordance with changing circumstances in their lives (Davis and Roberts, 1988). Research shows that reaching agreements in mediation is a vital component in the making and maintaining of cooperative relationships between divorcing parents in the future (McCarthy and Walker, 1996).

The mediation process is thus *forward-looking*. Whereas the judge looks backwards to events of the past and makes a judgment on the facts in terms of the legal norms connected with them, the mediator looks forwards to future courses of action and their consequences (Eckhoff, 1969). That is what makes the mediation process appropriate to the negotiation of family disputes concerning children, where future child care and child raising arrangements have to be determined over several years, arrangements which require constant coordination between the parents (Roberts, 2008).

In addition, the *decisions in mediation are made by those who have to live with them*, rather than by a third party. The retention of control over their own affairs can assist the parties in their recovery of self-respect and dignity. The intact family usually makes decisions without interference from other parties. Family break-down should not become an excuse for external agencies to interfere and take control of family matters, but enable these to be fully resumed. What substantially sets mediation apart from traditional judicial proceedings is that the parties strive to find common ground, and work to develop mutually agreeable solutions with each other and without any exterior imposition of a decision by someone else. A mediated agreement is more likely to be adhered to by the parties precisely because it is voluntary (Emery, 1994).

Mediation enables parents to decide the *best arrangements to suit their family's needs* and can better take into account the emotions of the parents and the interests

of the child. Mediation seeks to generate an agreement that is realistic, which takes into consideration the financial condition of the parties as well as other relevant circumstances.

In addition, mediation *accommodates the multi-dimensional aspects of family disputes* – legal, ethical, emotional and practical. Mediation allows the parties to draw up their own agendas and define issues in their own terms, incorporating what might be important to them, ethically or emotionally, however irrelevant these may be in law. The legal process, in comparison, is limited by the fact that it recognizes only legal norms and cannot therefore fulfill the psychological or ethical requirements of the parties and their children (Saposnek, 1983).

A further advantage concerns the *consideration of the costs and time efficiency of resolving disputes*. Mediation fees vary in accordance with the hourly rate of the mediator and the length and number of mediation sessions, and are usually shared equally by the parties, but mediation proceedings are always cheaper than ordinary judicial proceedings, including lawyer negotiation or adjudication (Emery, Matthews, and Wyer, 1991; Walker, McCarthy, and Timms, 1994; Glasser, 1994; McCarthy and Walker, 1996)¹¹. Another important advantage of alternative dispute resolution proceedings is in the *decreased time* these proceedings customarily take as opposed to the traditionally litigated dispute.

Mediation is an *informal and thus flexible process*, and there are a variety of mediation techniques available and employed depending on the mediator, the parties, and the complexity of the dispute. One unique feature of mediation is that the process is thoroughly voluntary, therefore any party can decide to stop the mediation at any time if they believe the process is not productive or is harmful.

The mediation process is *confidential*. Confidentiality is paramount to the effectiveness of the mediation process as it creates an atmosphere where all parties are increasingly comfortable to discuss their dispute without fear that their words will be used against them. Confidentiality promotes and facilitates open communication

¹¹ Exception: countries such as Germany where parties can get legal aid for legal proceedings but no support for paying for mediation. The costs are the same but the parties do not necessarily have to take on the costs.

about sensitive issues involved between the parties, and is especially important in family dispute matters.

More recently, the potential for mediation has been recognized in the context of parental child abductions. There are strong incentives for mutually agreed outcomes that could limit damage on relationships and children: avoid delay of returning children and resolving family conflicts; avoid expenses and costs for everyone, including public funds; avoid disruptive physical relocations; and reduce continuing conflict and trauma, especially for children (*reunite* Report, 2006). Additionally an agreement between parents obtained through mediation could obligate and empower parents to actively and purposefully address the issues affecting the future of their family.

Marian Roberts (2008) argues that the Hague Convention should be complemented with mediation processes to redirect at least a significant portion of cases into private resolution. Hague proceedings have proved to be especially incapable of solving the complex issues of custody and visitations. At the same time, the Hague Convention methods do not go to the root of the conflict. The aspiration outlined in Art 7 (c) of the Hague Convention, which calls for cooperation among Central Authorities to secure the voluntary return of the child or to bring about an amicable resolution of the issues, has not been met.

In light of these problems, different forms of alternative dispute resolution should explicitly be incorporated and explained in the language of the treaty. Instituting these as part of a protocol would allow well-established national models of dispute resolution to be transferred to an international and result in a more successful dispute resolution of international custody cases (Roberts, 2008).

3. CHILDREN'S PARTICIPATION IN MEDIATION

3.1. Introduction

Children's participation in decision-making in the context of family law is a relatively recent development¹². Historically, children were viewed as lacking the capacity to participate in family law matters and as being in need of protection from parental conflict (Morrow and Richards, 1996; Roche, 1999; Taylor, Smith and Tapp, 2001; O'Quigley, 2000; Smart, 2002; Emery, 2003; Warshak, 2003; Timms, 2003; Graham and Fitzgerald, 2005).

Recently, the importance of children's right to be heard and considered, especially in times of family breakdown have gained prominence in child theory as well as in the social science literature and research (see Aries, 1962; James, Jenks and Prout, 1998; Kaganas and Diduck, 2004; Lansdown, 2005; Prout and James, 1990; Smart, Neale and Wade, 2001, Kelly, 2002, 2003; McIntosh, 2000; Morrow, 1998; Neale, 2002; O'Quigley, 2000; Pike and Murphy, 2006; Smart, 2002, 2004; Smart and Neale, 2000; Smith, Taylor and Tapp, 2003; Strategic Partners, 1998; Tisdale, Baker, Marshall and Cleland, 2002; Schoffer, 2005; Thomas and O'Kane, 1998; Wade and Smart, 2002; Williams, 2006; Williams and Helland, 2007).

The social science literature and research have increasingly demonstrated that not listening to children in times of family conflict may cause more harm than good (Kelly, 2002; Lansdown, 2001; Pryor and Rogers, 2001; Smith, Gollop and Taylor, 2000), and that meaningful participation of young people in child custody and access disputes can protect them during the hard times of family breakdown (Amato, 2001; Butler, Scanlon, Robinson, Douglas and Murch, 2002; Cashmore, 2003).

In the 1990s, the greater experience of family mediators, the clarification of the nature of the mediation process in relation to family disputes, a productive interaction between researchers and practitioners in the field, and a new political

¹² Section based on the research report by Rachel Birnbaum (2009). *The Voice of the Child in Separation/Divorce Mediation and Other Alternative Dispute Resolution Processes: A Literature Review*, presented to the Family, Children and Youth Section, Department of Justice Canada

climate of thinking about the significance of the ‘voice’ of the child in decision-making led to a new appreciation of the complex role of children in the mediation process (UN Convention of the Rights of the Child, 1989; Garwood, 1990; Ogus, McCarthy, and Wray, 1987; Simpson, 1991; Davis and Roberts, 1988; Collinson and Gardner, 1990).

The *UN Convention on the Rights of the Child (CRC)* and the *European Convention of the Exercise of Children’s Rights* have promoted in a number of areas, including family mediation, practices of involving children in decisions on matters that affect them directly. Article 12 of the CRC states that:

- 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Additionally a range of international instruments has been adopted in Europe, which directly or indirectly regulate the child’s right to contact, as well as their procedural rights. The most important are:

- The 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR);
- The 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (Hague Child Protection Convention);
- The 1980 Hague Convention on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention);
- The 1996 European Convention on the Exercise of Children’s Rights (ECECR);
- The 2002 White Paper of the Council of Europe on Principles Concerning the Establishment and Legal Consequences of Parentage;
- The 2003 European Convention on Contact Concerning Children (ECCC); and

- The Council Regulation (EC) No. 2201/2003 Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility (Brussels II bis).

A brief look at legislation in European countries also shows important developments worth mentioning here. For example, under the Children Act, 1989, according to English law, when contact is contested and a contact order is being sought, it is mandatory for a court to take into account the wishes and feelings of the child concerned (Lowe, 2002). Similarly, under German legislation, a child over the age of 14 must always be personally heard in custody proceedings. The court may refrain from a hearing only for serious reasons (Dethloff and Martiny, 2004). An Italian Act, (L. 8. Febbraio 2006, n. 54) enables judges in divorce or separation proceedings to hear children over the age of 12 (Patti, 2004). In Sweden, the obligation to investigate the wishes of the child applies to court proceedings concerning contact matters, as well as to the work of the Social Welfare Committee (Jänträ-Jareborg, 2002).

In each of the European legal systems mentioned here and in many others, the child has the legal right to express his or her custody preferences in court. In reality, however, this right is not often exercised (Butler, Scanlan, Robinson, Douglas, and Murch, 2002; Buchanan, Hunt, Bretherton, and Bream, 2001; Tisdall, Baker, Marshall, and Cleland, 2002; Neale, 2002). Despite clear laws favoring children's participation in custody proceedings, research showed that judges and other professionals very often did not involve and did not think they should involve children in a hearing of a legal process (Douglas, Murch, Scanlan, and Perry, 2000; Kostka, 2004; Malagoli Togliatti, Lavadera, and Caravelli, 2004; Jänträ-Jareborg, 2002).

The available literature on approaches to hearing the voice of the child has, however, tended to focus mainly on approaches occurring under litigation. Although often post-separation decisions are made outside of courtrooms, little has been written about approaches to integrating children's voices into other areas of the justice system, like alternative dispute resolution, especially mediation. Taking this gap into account, in the following section, we will highlight the main lines of the debate on involving children in mediation.

3.2. The debate on involving children in mediation

Children's participation in mediation is currently an issue of dispute among mediators, but despite the debate, participation is constantly on the rise. There are several good practices that come from the Nordic countries, Canada, and Australia. The debate on participation is complex and long, but we will try to bring here a summary of the main reasons supported by the research evidence existing in both the *pro* and *contra* lines of the debate. It is also important to emphasize that the debate on whether children should participate in mediation or not has been crucial in highlighting the main concerns in the field, and also in indicating the way for the shift from the *if* to the *how* children should participate.

Those who argue *against* children participating directly in the mediation process are worried by the adverse impact the participation might have on the children, the parents and the mediators. Some researchers consider it to be an unfair burden on children to make a decision when parents are in dispute. Concerns have been expressed by mediators themselves who suggest that children may be manipulated by the parents to take sides during a disputed custody and access matter, thereby creating anxiety and loyalty conflicts for children (Brown, 1996; Emery, 2003; Garwood, 1990; Gentry, 1997; Saposnek, 2004; Garrity and Baris, 1994). Likewise, it is considered difficult and unfair to expect children, at a time of crisis, to make informed judgments about what was in their own best interests in the future¹³ (Mitchell, 1985; Wallerstein and Kelly, 1980).

Others have expressed concerns that involving children could undermine parental authority and lead to intrusion into children's lives and family relationships (Brown, 1996; Emery, 2003; Lansky, Manley, Swift and Williams, 1995). Additionally, it is argued, in the family-decision making process, parents commonly impose decisions on their children, like the decision to divorce, moving house or a parent's return to

¹³ Children's views change in time. Mitchell (1985), for example, described how when first interviewed, children expressed strong preferences for keeping their parents together even if they did not get on, rather than have them separate. Interviewed five to six years after divorce, only 6 out of 50 still thought their parents were wrong to have divorced. Wallerstein and Kelly (1980) also found that many of those children with the most passionate convictions at the time of break-up came later to regret those statements.

work and some argue that there is no reason to act differently in a conflict case (Maidment, 1998). Moreover, Warshak (2003) argues that presenting children's wishes without understanding the basis and context of those wishes can create more problems for children. He also argues that delegating too much authority to children instead of helping them develop coping strategies during times of parental separation may burden them with too much power.

Further qualitative findings from research reported by Goldson (2006), McIntosh (2000, 2007) and Garwood (1990) suggest that children would not benefit from being involved in child-inclusive mediation approaches in certain circumstances. These include, for example, when parents are feeling so overwhelmed that they cannot make use of the positive feedback given to them; where the conflict between the parents is characterized as high; and where parents have mental health issues that impede any positive working relationship.

Kelly (2003) and Saposnek (2004) also conclude that not all children necessarily need or want to be heard. They suggest that unless there is a request from the child and/or their parent for the child to be interviewed, there is no reason to do so. While some older children, may have a clear preference about their living arrangements following a parental separation, asking a younger child who has not voiced such an opinion is similar to asking that child to choose between his or her parents.

Another concern raised in advancing the argument against child participation is that once a child has been asked to express his/her views, s/he may be disappointed when his/her views are not determinative of the outcome. This can lead to feelings of anger and hurt if they were not listened to or feeling too much responsibility for the decision if they were listened to. Additionally, some children may not express their true feelings if they fear their parents' anger about their views and therefore should not be placed in that position (Brown, 1996; Drapkin and Bienenfeld, 1985).

Considering also the impact on mediators, it has been argued that additional demands would be placed on the mediator if a child is involved in the process, complicating or distorting their role. By including children in mediation, boundaries between mediation and therapy might become easily blurred.

On the other side of the debate, there are increasing voices who argue *in favour* of the direct involvement of children in the mediation process on several counts. The strongest arguments has been proposed by children's rights theorists, who argue that children have a legal right to be heard and listened to and be participants in the decision-making processes that affect their lives (Atwood, 2003; Brennan, 2002; Elrod, 2007; Lansdown, 2001, 2005; Woodhouse, 2000). Children have been seen for a long time as vulnerable and in need of protection, but as it has been argued, to some extent it is their lack of rights that creates that vulnerability (Morrow and Richards, 1996).

There have been significant emerging studies who have asked the opinions of children on their own participation. Such studies report that children generally want to be active participants in the decisions that affect their lives (Cashmore and Parkinson, 2007; 2008; O'Quigley, 2000; Parkinson, Cashmore and Single, 2007; Neale, 2002; Smith and Gollop, 2001). This does not mean that they wish to make the decisions or take sides with either of their parents, since, it has been argued, that children understand the difference between providing input into the decision-making process and making the final decision (Kelly, 2002; Morrow, 1999; O'Quigley, 2000). Many adults (including professionals) confuse participation with decision-making (Murch, Douglas, Scanlan, Perry, Lises, Bader, and Borkowski, 1998). Research confirms that children want to be kept informed, want access to information about the separation process and want their needs and interests heard during times of parental separation (Birnbaum, 2007; Marchant and Kirby, 2004; Neale, 2002; Smith, 2007)

Some have also cited the social science and research literature that demonstrates that children's participation in a number of decisions, including their experience of parental separation (Cashmore and Parkinson, 2008; Butler *et al.*, 2002; Dunn and Deater-Deckard, 2001; May and Smart, 2004; Neale, 2002; Smith *et al.*, 2003; Smart, 2002), correlates positively with their ability to adapt to a changed family situation (Butler, Scanlon, Robinson, Douglas and Murch, 2003) as well as to their ability to regain control over the harm of post-separation (Brown, 1996; Butler *et al.*, 2002; Saposnek, 1998; Walczak and Burns, 1984).

Participation therefore can be a protective factor during times of parental separation (Brown, 1996; Pryor and Emery, 2004; Pryor and Rogers, 2001) as it provides children with a sense of responsibility and improved parent-child relationships (Brown, 1996; Goldson, 2006; Sanchez and Kibler-Sanchez, 2004; Cashmore and Parkinson, 2007, 2008). Including the voice of the child can also enhance their sense of self-esteem and control over their destiny, thereby enhancing their resiliency (Kelly, 2002, Marchant and Kirby, 2004; Pryor and Emery, 2004; Williams, 2006; Richards, 1999; Dasgupta and Richards, 1997, Smith, 1999). Children are always aware that something important is happening in their lives, and lack of communication with children makes them more vulnerable rather than protecting them.

Others have argued for children's inclusion as being important because it provides the most direct understanding of children's needs. Research findings suggest that parents' views of their children's needs might differ considerably from what the children themselves say they need (Wallerstein and Kelly, 1980; Walczak with Burns, 1984; Mitchell, 1985). Goldson (2006), McIntosh (2000), and Kelly (2002) report that listening to what children have to say can be a very powerful tool in helping parents understand their children's needs and interests. Children's participation in decision-making can also enhancing their communication and negotiation skills with their family. Focusing on the needs of children early in the process of parental conflict can also reduce both the intensity and duration of conflict (McIntosh, 2003) as well as enhancing conciliation between parents to communicate more effectively on behalf of their children (Goldson, 2006; Lyon, Surrey, and Timms, 1998).

Those practitioners in the field who advocate a 'family systems' approach to mediation require the presence of all family members as 'contributors to the interactional process' (Saposnek, 1998). It is also argued by some of the practitioners that the physical presence of the children is a clear reminder to the parties of their parental responsibilities (James and Wilson, 1986). While the debate continues in the social science literature and in practice regarding whether or not children's voices should be heard in the process, the research literature increasingly shows that children and their parents have better relationships and there is less parental conflict

between the parents when children are part of the process (Goldson, 2006; McIntosh, 2007). In the next sub-section we will describe approaches of mediation that include children in mediation.

3.3. Approaches of including children in mediation

There is increasingly agreement that the voice of the child is important and should be heard in mediation during times of parental separation and divorce. However, the question of which is the best approach to having their voice heard and when their voice is to be heard remains less clear. Traditional mediation approaches do not usually involve children and when they are involved, there is no consensus as to whether the same mediator should interview the children or whether a separate mediator should interview the children. In one study of practicing mediators in England, Murch *et al.* (1998) found that while mediators are aware of the importance of children's voices, the mediators addressed children's issues by having the parents think about the needs of their children, rather than directly talking to children.

A few mediators allow children to come to a concluding session after agreement has been broadly reached so that they can hear directly from both parents the arrangements that have been reached for them because they believe it has great symbolic importance for the children and allows them to feel part of the decision-making process without being forced to take sides or make impossible choices (Dasgupta and Richards, 1997). Sometimes mediators see the child on their own and then present the child's interests in later mediation sessions with the parents. However, this raises problems over the supposedly neutral stance of mediators (Dasgupta and Richards, 1997). Many professionals are aware of their lack of training and experience in talking to and listening to children (Davie, Upton, and Varma, 1996; Murch *et al.*, 1998; Hunt and Lawson, 1999; Morrow, 1999).

Currently, children and youth participate in separation and divorce mediation and other ADR processes in a variety of ways:

- by directly participating in a mediation session;
- by directly participating in a mediation session but with the help of a support person (either a lawyer or a child specialist); or,

- by indirectly participating, for example, by having his/her views sought and fed back into a mediation by a mediator (the same or a different one) or by a child specialist.

Child Focused mediation

Child Focused Mediation brings the voice of the child into the mediation without the child's actual physical presence. When the mediator conducts a child-focused mediation, they ask a parents what the child is like, bring in pictures of the child, have parents talk to an empty chair, or makes questionnaires for the parents¹⁴.

The aims of Child Focused mediation are to:

- Create an environment that supports disputing parents in actively considering the unique needs of each of their children.
- Facilitate a parenting agreement that preserves significant relationships and supports children's psychological adjustment to the separation, including recovery from parental acrimony and protection from further conflict.
- Support parents to leave the dispute resolution forum on higher, rather than diminished ground with respect to their post separation parenting, and
- Ensure that the ongoing mediation/litigation process, and the agreements or decisions reached, reflect the basic psycho-developmental needs of each child, to the extent that they can be known without the involvement of the children (McIntosh, Long and Wells, 2009).

*Child Inclusive mediation*¹⁵

Child Inclusive mediation brings in the voice of the child heard directly. Unlike the Child Focused approach, the Child Inclusive model involves consulting with children, in a supportive, developmentally appropriate manner, about their experiences of the family separation and dispute. Child-inclusive mediation, provides children with

¹⁴ Notes from the presentation of Lisa Parkinson in one of the TIM trainings.

¹⁵ The 'child inclusive' approach to family mediation practice initially referred to a specific practice approach and model, piloted in two sites in Australia (Darwin and Melbourne), that aimed to embrace children's concerns and interests in all aspects of overall practice, whether counseling or mediation (McIntosh, 2000). Recommended as a 'good practice' approach, it could consequently be realised in different models of practice. Australia and New Zealand have for more than 10 years been *avant guard* in providing empirically-based child-inclusive practice approaches with children (see FACS, 2002; Hewlett, 2007; Mackay, 2001; McIntosh, 2000, 2003, 2005; 2006, 2007; McIntosh, Bryant and Murray, 2008; McIntosh and Deacon-Wood, 2003; McIntosh and Long, 2005, 2006, 2007; McIntosh, Long and Moloney, 2004; McIntosh, Wells, Smyth and Long, 2008; McIntosh, Wells, and Long, 2007; Moloney, 2005, 2006; Moloney and McIntosh, 2004; Goldson, 2006).

more autonomy and direct input into the decision making process. There are differences whether the mediator communicates with the child alone or in the presence of the parents, or whether the child is heard alone or in the company of a professional or a support person.

The main objectives of Child Inclusive mediation are:

- To get to know the child and hear something about his or her friends, hobbies, sports and interests;
- To give the child the opportunity to talk about their feelings and to be consulted;
- To relieve the child of the burden of having to make a decision;
- To encourage the child to take an independent role, for example by giving ideas for a solution or a partial solution to the problem;
- To carefully support the child's chance to renew contact to the absent parent in cases where contact was interrupted for an extended period of time;
- To validate children's experiences and providing basic information that may assist their present and future coping;
- To form a strategic therapeutic conversation with the children's parents, supporting them to reflect on their children's experiences and needs, and motivating them to reconsider their behaviour, attitudes and the goals of the mediation in light of those needs;
- To ensure that the ongoing mediation agenda and the agreements reached reflect the psycho-developmental needs of each child;
- To release the child from feeling co-responsible for what is going on between their parents – this is the sole responsibility of the parents¹⁶ (see also McIntosh, Long and Wells, 2009; Gamache, 2005, 2006; Gentry, 1997; Goldson, 2006; Kelly, 2002; McIntosh, 2000).

3.4. Finding a balance in mediation

It is clear that children's voices are an important component in the separation and/or divorce process as voiced by the practitioners, researchers, lawyers, and policy makers. Irrespective of whether they are heard through child focused or child-inclusive mediation, independent child legal representation, judicial interviews, child

¹⁶ *ibid*

specialists, parenting coordinators or voice of the child reports, children's voices are important and need to be heard and listened to by their parents, mental health and legal professionals, the judges, and mediators. However, many have also stressed that not every child needs or wants to have a voice and that, too, should be considered.

The difficult question, in each unique, delicate and complex family situation, is how to reach a balance between the rights and obligations both within families, and between families and professionals. There are pros and cons to both sides of this debate, but it seems that much depends on the context of each situation.

On one hand children's participation depends on the theoretical and conceptual lens of the mediator. To hear the child, the mediator must have the conceptual viewpoint that children have rights and that their voices should be heard and recognised. Moreover, although not a therapist, the mediator must have an understanding of the evolving developmental capacities of children. Children's participation depends also on the communication training of the mediator and how comfortable s/he is with communicating with children. Whatever the circumstances are, the mediator has an ethical responsibility to ensure that the needs of children – and of everyone who is affected by the decisions– are taken into account in the decision making.

Saposnek (2004), Kelly (2002), Emery (2003), Goldson (2006), McIntosh (2000, 2007), and Garwood (1990) provide some helpful tips on when to include and exclude children in the mediation process. All stress that the mediator must have the skills, training, and knowledge base, in addition to being comfortable in communicating with children when including children in mediation. They suggest that children *should be included* in the following circumstances:

- when children consistently express a preference for a particular type of time-sharing arrangement and one parent or the other disagrees;
- when a child has specifically requested to speak to the mediator;
- when both parents need to hear from their child about the negative impact that their dispute is having on the child;
- when children have the cognitive ability to relate their views and wishes to a mediator (for ex. six to 16 years of age);

- when that child (particularly the older child) was creating obstacles to any agreement the parents might wish to make, or had access to information unavailable elsewhere;
- in occasions when one parent, voicing the child's point of view, was disbelieved by the other parent;

They also suggest that children *should be excluded* in the following circumstances:

- when both parents can agree on the needs of their child and can develop a mutual parenting plan that meets the needs of their child;
- when children are too young and do not possess the cognitive ability to reliably communicate their wishes (typically children under three years of age);
- when children exhibit emotional and behavioral complaints about meeting with a mediator;
- when children are being manipulated by one parent or the other;
- when parents are feeling so overwhelmed that they cannot make use of the positive feedback given to them regarding their children during mediation;
- where the conflict between the parents is characterised as very high;
- where parents have mental health issues that impede any positive working relationship.

In the final analysis, the discussion is no longer focused on the question whether children should participate in the decision making post separation and/or divorce, but rather, *how* should they participate. Many factors have been identified by researchers as facilitating more successful communication with children. While the approaches vary regarding how and when to include children in mediation, the following qualifications need to be considered, in their full complexity:

- the age of the child*: on one hand the age of the child seems to be a crucial factor to consider, on the other hand it has been argued that it may be misleading to make assumptions on the basis of the child's age (Neale, 1999; Morrow, 1998);
- the cognitive, emotional, and cultural development of the child*: rather than the age, mediators should be aware of developmental and cultural factors although they should not make assumptions about the individual child based on this global

knowledge (Schofield and Thoburn, 1996). Mediators should also be attending to issues of diversity, language and other barriers that may impact and/or limit children's involvement;

- *obtaining children's consent* regarding whether they want to be interviewed or not: rather than assuming that all the children would like their voice to be heard by default, it is important to bear in mind that some children may not want to participate in decision-making at all (Trinder, 1997; Kelly, 2003; Saposnek, 2004);

- *inform the children adequately*: adults need to bear in mind that the child will need adequate information if they are to express an opinion or explore options (Lansdown, 1992; Lyon *et al.*, 1998);

- *be aware of issues of power*: adults need to be aware of the difference in power between them and the child, and the impact this has on communication, and try to minimise these effects by adopting a non-intrusive style of communication and an egalitarian rather than patronising or hierarchical mode, even if this is benevolent (Neale, 1999);

- *ensure the child's safety*: the interviewer should always be alert for and acknowledge any sign of distress on the side of the child (Brannen, Heptinstall, and Bhopal, 2000);

- *ensuring confidentiality but also explaining its limits*: many researchers note that confidentiality is crucial (Brannen *et al.*, 2000; Douglas, Murch, Robinson, Scanlan, and Butler, 2001; Neale, 1999; Roberts, 1999; Roche, 1999), because it is empowering and allows the child to speak freely, but if unconditional confidentiality cannot be guaranteed then this should be made clear at the outset so that the child does not feel that confidences have been betrayed;

- *ensuring that mediators are properly trained and qualified to communicate to children*: communication should begin with open, general questions to establish rapport and free discussion (Hall, 1996), and indirect questions should be avoided as these are experienced by children as 'trick' questions (Neale, 1999,). The adult must

learn to allow the child to tell their whole story, and not rush to interpret the child's story (Barnes, 1996). Good communication is more likely to occur if adults see children's abilities and competencies as being *different* from rather than *lesser* than adult ones;

●*ensure that child-friendly techniques and arrangements are used:* one-to-one interviews, especially with an adult who is a relative stranger, may put too much pressure on younger children (Morrow, 1999), therefore it may be appropriate to use drawing, vignettes, sentence completion, group discussions or other such methods (Morrow, 1999; Brannen *et.al.*, 2000). The adult should also be aware that their choice of clothes, tone of voice and posture can emphasise power differences (Ross, 1996). At the same time, whenever possible the venue should be chosen by the child (Neale, 1999), and if an interview must be in an office then it should be a child-friendly environment (Ross, 1996). It is also important to consider that younger children may find it much easier to speak if they have a friend or someone else accompanying them.

4. THE CULTURAL CHALLENGE TO INTERNATIONAL FAMILY MEDIATION

4.1. Introduction

Mediating an international family conflict in general and in particular a parental child abduction case can be a great challenge. These cases are likely to involve complex emotions, time constraints, multiple national laws and policies, various international treaties, interpreters, attorneys, government officials, judges, and parents who may be miles apart, and have different cultural customs¹⁷.

The Council of Europe, Committee of Ministers, has drafted a Recommendation in 1998 with regard to Family Mediation, noting its benefits as: improving communication between family members, reducing conflict, producing amicable settlements, providing continuity of personal contacts between parent and child, lowering the social and economic costs of divorce, and reducing the length of time otherwise required to settle matters. The Council has noted that a mediator engaged in international mediation, should undergo specific training, but it does not go into further details about the content of such a specific training.¹⁸

The "culture" part of the mediation has only recently begun to be incorporated into mediation trainings. Defining culture is not an easy task, as it entails long theoretical and political debates. Nevertheless, we will adopt here a broad definition of culture as "the shared assumptions, values, and beliefs of a group of people which result in characteristic behaviors" (Storti, 1999: 5). It is argued that while culture may change and adapt through contact with outsiders, the deep structure of a culture, including values and beliefs, tends to persist from generation to generation (Samovar and Porter, 2000).

A majority of individuals within a certain group conform to similar values, creating what is called the "dominant culture" (Bennett, 1998). Those who do not conform to

¹⁷ The section is mainly based on "Culture in International Parental Kidnapping Mediations" (2009) by Melissa A. Kucinski

¹⁸ Council of Europe, Comm. Of Ministers, *Recommendation No. R (98)1 of the Committee of Ministers to Member States on Family Mediation* (Jan. 21, 1998).

the dominant culture hold different cultural values, creating thus subcultures. Within the dominant culture and subcultures, individuals inhabit multiple levels of culture, from national identity to family, professional identity, or regional, gender and generational affiliations. In this sense, culture becomes on the one hand a lens through which each person sees the world and on the other hand every person carries multiple lenses which can be national, ethnic, sexual, racial, local, and occupational (Avruch, 1998; 2002).

Layers of cultural affiliation are strong indicators of the way we react to manage, perpetuate, and resolve conflict, or in the case of mediators, help others deal with their conflicts. Culture can exacerbate conflict, resolve it, transform it, and affect how the two parents involved in the conflict communicate about it (Avruch, 1998). Similarly, culture affects the way a mediator communicates with each parent, and the way a mediator interprets the parent's verbal and non-verbal messages. Mediators cannot be trained to understand all cross-cultural communication, but a mediator can be aware (without being oppressed by the knowledge) of the influences culture has on communication and on the resolution of a conflict (Kucinwsky, 2009).

4.2. The importance of cultural theories for mediation

Generally while dealing with cross cultural negotiations or mediation there are stereotypical assumptions for “dos” and “don’ts” of the type ‘do not offer your left hand to an Arab or deeply bow to a Japanese negotiator’ (Avruch and Black, 1990). It is therefore always a risky business to try and describe cultural theories, and lay out general assumptions without falling into stereotypical cultural clichés. Although many of the cultural systems theories have been criticised on several grounds, it is beyond the scope of this report to reflect the long theoretical debate here. Instead we will highlight the importance of a few theories as they relate to support the mediators in approaching international family conflicts. In doing so, we would like to emphasise the ‘construct’ element of these theories, in that they must be viewed rather as theoretically useful constructs rather than ‘naturally’ existing features within various populations.

4.2.1 Individualism-Collectivism dimension

Individualism and collectivism dimension refers to the manner in which individuals perceive themselves in relation to other members of the society (Hofstede 2001; Kim, Triandis, Kagitcibasi, Choi, and Yoon, 1994; Kagitcibasi, 1997), and it is the most important and broad dimension researched and discussed in literature for differentiating nations and cultures. Individualistic cultures are defined by detachment from relationships and community, whereby the individual views himself or herself as relatively independent from others (Triandis, 1994). Those who affiliate with individualist cultures believe it is important to satisfy the needs of the individual before those of the group as individual identity, rights, and freedom are more important than group identity, rights and freedom. Individualists seek outcomes reached efficiently, objectively, equitably, and often through competition and formal processes. The societies which develop individualistic characteristics encourage emotional independence, self-sufficiency, assertiveness, the need for privacy, and autonomy (Hofstede, 2001).

In contrast, collectivist cultures stress the importance of relationships, roles and status within the social system. Identity is tied to a primary group, usually the family (Hofstede, 2001; Pitts, Moon and Bingham, 2002). A typical family group includes multiple generations and extended family (adult children, aunts and uncles, and grandparents) often live together. In a collectivist society thus, there is a large interdependency, harmony, cooperation, and loyalty with familial groups (Oishi, Schimmack, Diener, and Suh, 1998). Collectivists seek outcomes reached informally, sustaining social relationships, face, and harmony. Correspondingly, collectivists tend to act in ways that maintain group cohesion and they also are encouraged to conform with their parents, family, and larger social groups by avoiding open conflict within the in-group (Ho and Chiu, 1994; Markus and Kitayama, 1991; Triandis, 1989; Triandis, McCusker, and Hui, 1990).

Differences in the historical and religious backgrounds of various cultures are important factors which contribute to variations in particular collectivistic and/ or individualistic characteristics observed. Only one-third of the world's populations lives in individualist societies while the remaining two-thirds are collectivist (Ting-Toomey and Oetzel, 2001). Many countries are likely to fall somewhere in the

individualism-collectivism continuum rather than the extremes. Guatemala, Indonesia, Ecuador, Egypt, Nepal, Taiwan, Latin America are examples of collectivist countries, while examples of individualist countries are the USA, Canada and the Western European nations (Fiske, Kitayama, Markus, and Nisbett, 1998; Hofstede, 1980, 1991; Smith and Bond, 1998; Triandis, 1989).

Various conceptions of collectivism and individualism have been the focus of extensive research in the years following since Hofstede (1980) identified these constructs as opposite poles of a value dimension that differentiates world cultures. These two cultural orientations, have been shown to be related to the differences in human thought and behavior such as emotions, morality, attributions, goals, sense of self, and social relationships. It is assumed that these different orientations result in different family relationships, parent-child interactions, self-conceptions, and academic achievement (Chao, 1994; Triandis, 1995). This multidimensional conceptualization has led researchers to measure these two constructs in various domains, such as those of values (Bond, 1988; Hofstede and Bond, 1984; Schwartz, 1990, 1994; Schwartz and Bilsky, 1987, 1990), morality (Miller, 1994; Miller, Bersoff, and Harwood, 1990), self-construals (Bochner, 1994; Bond and Cheung, 1983; Cousins, 1989; Markus and Kitayama, 1991; Rhee, Uleman, Lee, and Roman, 1995; Shweder and Bourne, 1982; Singelis, 1994; Triandis, 1989), attitudes (Hui and Triandis, 1986), and reports of behaviors (Hui, 1988; Yamaguchi, 1990, 1994; Wheeler, Reis, and Bond, 1989).

4.2.2. High context-low context dimension

A primary issue among those who study cross-cultural communication is that of context. It was the anthropologist Edward T. Hall who identified the communication style continuum called “low-context” to “high-context”¹⁹. Hall observed that “meaning and context are inextricably bound up with each other” (Hall, 2000, p. 36), and suggested that to understand communication one should look at meaning and context. By context, he refers to the situation, background, or environment connected to an event, a situation, or an individual. In other words, low and high-context refer

¹⁹ See Edward T. Hall, *Beyond Culture* 105-128. See also *Communicating Across Cultures* available at <http://www.culture-at-work.com/highlow.html> (last visited on 25/04/2012)

to how much of the meaning of a communication comes from the surrounding context, as opposed to the actual words exchanged.

A high-context message is one in which most of the information is either in the physical context or internalised in the person, while very little is in the coded, explicit, transmitted part of the message. In contrast, a low-context message is one in which the majority of the information is found in the explicit, verbal language or code. In high context communication greater confidence is placed in the non-verbal aspects of communication than the verbal aspects. High context communication draws on physical aspects as well as the time and situation in which the communication takes place, not to mention the relationship between the interlocutors. The closer the relationship, the more high context the communication tends to be, drawing on the shared knowledge of the communicating parties and using extensive non-verbal strategies for conveying meanings. These strategies usually take the shape of behavioral language, such as gestures, body language, silence, proximity and symbolic behavior, while conversation in low context cultures tends to be less physically animated, with the meaning depending on content and the spoken word.

By using scales meant to conceptualise the difference between high- and low-context communication, Gudykunst, Matsumoto, Ting-Toomey, Nishida, Kim, and Heyman (1996) identified high context communication to be indirect, ambiguous, maintaining of harmony, reserved and understated. Hall adds that those who use high context communication will set the context and the setting and let the message evolve without referring to the problem directly. In the event of a conflict arising, high context cultures tend to use indirect, non-confrontational, and vague language, relying on the listener's or reader's ability to grasp the meaning from the context.

Communication in low context cultures was identified by Hall as “just the opposite [of high context communication]; i.e. the mass of information is vested in the explicit code” (Hall, 1976: 79). Gudykunst *et al.* (1996) identified low context communication as direct, precise, dramatic, open, and based on feelings or true intentions. In a low-context culture, people tend to say exactly what they mean rather than to suggest or imply, and the spoken word carries most of the meaning. Low context cultures tend to use a more direct, confrontational, and explicit approach to ensure that the listener

receives the message exactly as it was sent. People are not expected to read into what is not said or done to embellish the meaning. Low-context communication is more common in individualistic cultures, where there is less reliance on shared experiences as a basis for understanding. As there is less shared experience and history, the speaker must convey background information and spell things out in detail. A low context individual aims to solve problems and tends to go right to the heart of it, something which may intimidate a high context individual and escalate the conflict.

Kaplan (1966), Chen and Starosta (1998), and Choe (2001) outline the main differences between the thought patterns of high context cultures and low context cultures. Thought patterns “refer to forms of reasoning and approaches to problem solution and can differ from culture to culture” (Choe, 2001:3). Low context cultures tend to emphasize logic and rationality, based on the belief that there is always an objective truth that can be reached through linear processes of discovery. High context cultures, on the other hand, believe that truth will manifest itself through non-linear discovery processes and without having to employ rationality.

There are numerous cultural communication considerations of which to take account, like shaking hands, touching a parent’s shoulder, room arrangement, etc. furthermore, mediators need to be trained to deal with emotion. Different cultures are comfortable with different levels of showing emotion. For example, eye contact can - depending on the context of communication - at the same time show interest and empathy or disrespect and boldness. One of the most culturally based emotions, for example, can be shame. Shame can play a different role depending upon the culture of the individual. If the person is from a high context culture, then “standing, reputation, and honor are paramount”(Cohen, 1997:75) and outward appearances are to be maintained at all costs.

The mediator must make sure that there is no loss of face within the mediation process. This may be difficult if the mediation moves toward a speedy resolution, such as in an international parental child abduction case. For example, a low context culture may be more preferential to businesslike and to-the-point processes when resolving a conflict. In understanding the importance of the concept of time in

mediation, we will refer to another important axis: monochronic versus polichronic time dimension.

4.2.3. Monochronic-polichronic time dimension

Another cultural difference lies in the manner in which people perceive and deal with *time*. There are two identified time orientations that vary and affect communication across cultures (Hall, 1989). A monochronic culture perceives time as linear, quantifiable, and in limited supply, where people believe that it is important to use time efficiently (LeBaron, 2003). Efficiency is important, which leads to a sense of urgency and the needs of people are adjusted to suit the demands of time, resulting in well planned and organised schedules and deadlines. Unforeseen or spontaneous events should not interfere with plans, and interruptions are seen as a nuisance, while commitment to time is the essence of professionalism.

In a polychronic culture, time is perceived as limitless, not quantifiable and adjustable to the needs of people. In polychronic cultures, multiple tasks are handled at the same time, and time is subordinate to interpersonal relations. Schedules and deadlines get changed frequently and people may need to do several things simultaneously, including many conversations. It is appropriate in such a culture to split attention between several people or tasks, and it is not necessary to finish one thing before starting another. Latin American, African, and Middle Eastern cultures all tend to be polychronic. Those who are not used to this cultural time concept may find a person coming from a polychronic culture overwhelming to the mediation process. Polychronic cultures have different patterns of turn-taking when speaking than do monochronic cultures. Interrupting another speaker is not uncommon in a polychronic culture, and in fact may be taken as indicative of one's interest or enthusiasm.

For those in polychronic cultures, both business and social matters take time and often require multiple visits, where one visit would suffice to accomplish the same purposes in a monochronic culture. This could cause problems with scheduling mediation sessions, or working through a mediation that may tend to take more time than the mediator is able (or willing) to dedicate to the mediation. In negotiations, for

example, monochronic approaches dictate prompt beginnings, scheduled breaks and closings, turn taking when speaking, and adherence to an agenda. Polychronic participants may arrive after the scheduled start, talk through breaks, interrupt each other to contribute to ideas, and freely deviate from an agenda (LeBaron, 2003).

4.2.4. Low-High power distance dimension

Another concept of significance during mediation is that of “power distance” (Hofstede, 1997:5). Hofstede’s power-distance dimension refers to how power is organised in society in general. In high power-distance societies, an important emotional distance separates subordinates from authorities. Respect and formal deference for higher status people (e.g., parents, elders) are valued. Moreover, in a high power distance society, people tend to accept inequalities in power and status as natural (Hofstede, 1980). As a result, some individuals have more power and influence than others, and as such they emphasise their status, avoid delegating or sharing it, and distinguish themselves from those without or with less power. This also implies that they are expected to accept the responsibilities that go with power, including looking after those ‘beneath’ them. Criticism or disagreement with those in authority by subordinates is viewed as undesirable, and subordinates are not encouraged to take initiative and are closely supervised (Crocker, Luhtanen, Cooper, and Bouvrette, 2003).

In a high power distance society, obedience to and respect for elders are essential, family ties are close, and parents encourage dependence on the family throughout life. In school, students show great deference to teachers, often standing up when the teacher enters the room. Teachers deliver information and students receive that information unquestioningly. Students speak only when spoken to, and expect to receive knowledge from the teacher. In the workplace, power is centralised, and the organisation is very hierarchical where special privileges for the boss are accepted and expected, and wide salary gaps are common.

In a low power distance culture, individuals see inequities as man-made and largely artificial where those with power tend to deemphasise it, minimise differences between themselves and subordinates, and delegate and share power to the furthest

extent possible. Subordinates are encouraged to take initiative and are rewarded for it, while informality is encouraged and the criticism of authorities is considered appropriate. Discussion and consultation are desirable in case of difference of opinion.

Parents in a low power distance society encourage children to be independent and to find their own way and teachers treat students as equals. The educational process is student-centered where arguing with a teacher is acceptable, and teachers encourage independent thinking and self-study. The same dynamics exist in the workplace. The salary range between the boss and subordinates is relatively small, and privileges for more highly placed employees are few and not conspicuous. It also contemplates people valuing equalisation of power and competence over seniority (Hofstede, 1980). People believe that hard work and perseverance can make them realise their dreams and aspirations (Thompson, 2004; Hoberek, 2005).

Examples of low power-distance countries are Austria, Denmark and New Zealand, and of high power-distance countries, Malaysia and Guatemala. The United States falls near the middle of the power distance continuum, but closer to the low end. Indian society would also fall in the middle of the power distance continuum, but closer to the higher end due to the fact that there is still lot of influence of ones caste, background and community.

4.2.5. Parental ethnotheories²⁰

At the crossroads of psychology and anthropology, Charles Super and Sara Harkness (1992) have developed the term “parental ethnotheories” to help explain cultural differences in parenting. Ethnotheories are collective beliefs held by a cultural group about children's development and behaviour, and include expectations about the cognitive, social and emotional development of children (Rosenthal and Roer-Strier, 2001).

²⁰ Based on the “Differential parenting of children from diverse cultural backgrounds attending child care” by Sarah Wise and Lisa da Silva, Australian Institute of Family Studies, April 2007; and “Parental Ethnotheories And Customs Of Childrearing In Two Roma Urban Communities in Greece: Examining The Developmental Niche Of The 6-Year-Old Child” by Efthymia Penderi and Konstantinos Petrogiannis, Journal of Social, Evolutionary, and Cultural Psychology, 2011, 5(1), 32-50.

Culturally embedded beliefs and expectations are thought to give shape to the childrearing practices and other elements in the environmental context of the developing child. Specific examples of childrearing practices that are influenced by ethnotheories include the physical and social setting experienced by the child, such as the number and people living in a household, gender expectations, even the child care arrangements that parents make for their children, such as whether a child is looked after by a member of the child's extended family or by an unrelated carer in a group care setting (Harkness and Super, 1992, 1996; Segall, Dasen, Berry, and Poortinga, 1999).

Basic care regimes are also influenced by culture and cultural customs. Sleeping arrangements, for example, such as whether parents or siblings share their bed with the child or not (DeLoache and Gottlieb, 2000), as well as the time parents spend in close physical contact with their child by carrying/holding them, and soothing them with close physical contact, are both likely to reflect the habits and customs of the parents' culture (Webb, 2001). Cross-cultural differences are also recognised in a number of different aspects of feeding practices, with some parents encouraging independent feeding and others preferring to directly feed their children (Harwood, Scoelmerich, Schulze, and Gonzalez, 1999).

Culture is also thought to influence parenting goals. Gonzalez-Mena (2001) suggested that parenting goals, or the attributes that parents hope will be expressed in their children, are a reflection of the cultural context in which parents live. Researchers generally agree that parents hold childrearing goals that are consistent with the goals and expectations held by the culture with which they affiliate (Harwood *et. al.*, 1999). The aspirations that parents have for their children's development naturally influence the way they interact with their children. The extent to which parents wish children to develop a sense of family duty, for example, may determine the amount of time children are involved in household chores or looking after siblings compared to the time they spend in 'free play' (Harkness and Super, 1992). Parents, as the primary caregivers especially in the early years, play an important role in orchestrating the context of the child's experience, directly through their beliefs and behaviors and indirectly through the network of relationships they develop within the family and the broader society.

4.2.6. Correlations of various dimensions

The dimensions mentioned above are obviously not static dimensions which exclude one another, but on the contrary, are highly intertwined. For example, the collectivism-individualism dimension and the high context-low context dimension show a high correlation: high context cultures tend to be collectivistic while low context cultures tend to be individualistic.

Another of Hofstede's dimensions, which is tied to the high context-low context dimension as well as to the collectivism-individualism dimension, is the low-high power distance dimension. The characteristics of cultures with high power distance include many hierarchical levels, autocratic leadership, and the expectation of inequality and power differences, and are affiliated with high context and collectivistic cultures such as Japan. In contrast, low power distance cultures are characterized by flat organisation structures, consultative or participative management style, and the expectation of egalitarianism, especially evident in low context and individualistic cultures such as the Scandinavian countries.

At the same time, Hall (1976) noticed that the perception of time is culture-specific. He identified cultures belonging to either end of the spectrum as being either polychronic or monochronic, where high context, collectivistic, and high power distance cultures are polychronic, and low context, individualistic, and low power distance cultures are monochronic.

Cross-cultural parenting research has also drawn an association between childrearing aspects (such as parenting goals, discipline practices, and beliefs about children's development) and the characteristics of individualistic and collectivist societies (Harwood *et al.*, 1999; Chao (1995). Parental ethnotheories are conceptualised as the mediating structure between the cultural models of individualism and collectivism. In this way, parents' descriptions of their child's characteristics within the context of their goals and expectations regarding the child's development are considered particularly informative of the general childrearing values held by both the family and the community in all the developmental periods, reflecting the orientation of those

values to the individualistic-collectivistic cultural model (Harkness and Super, 2006; Tulviste and Ahtonen, 2007).

Honest expression of emotion is another childrearing goal that is known to vary considerably across individualistic and collectivist cultures. If individualism is valued, then the expression of emotion is encouraged and children are taught to communicate their personal feelings. Collectivist societies, however, tend to emphasise emotional control, or the expression of only positive emotion, so that group dynamics are not disrupted (Gonzalez-Mena, 2001). At the same time, in collectivist countries, parents promote values such as helpfulness, conformity, adherence to social conventions and interdependence with their in-groups such as family and nation in child socialisation (Greenfield and Suzuki, 1998; Grusec, Rudy, and Martini 1997; Bornstein, 1995; Kim, 2005; Baumrind, 1972).

Cultural differences are also found in how parents manage difficult child behaviour. Removing a child from adults or peers for a period of time (commonly referred to as 'time-out') is often seen in Western cultures as an acceptable way to help young children avoid antisocial or difficult behaviour. However, parents who belong to a collectivist culture can view the use of time-out as very harsh, and tend to reserve it for extreme situations (Kolar and Soriano, 2000). It has been shown that cultural factors, such as race, ethnicity, and socioeconomic status may affect parenting styles (defined as authoritative, authoritarian, and permissive) (Park and Bauer, 2002; Chao, 2001; Rebecca, 2006; Leung, Lau, and Lam, 1998; Cote and Bornstein, 2003; Baumrind, 2005).

4.3. Minding culture in mediation

4.3.1. The relevance of the cultural dimensions for conflict and conflict resolution

The contrasting cultural dimensions imply also *contrasting views of the nature of conflict and different approaches to resolving conflict*. Individualists tend to view conflict as a natural part of human interaction (Ury, Brett, and Goldberg, 1988); Fisher, Ury, and Paton, 1991; Kovach, 1994; LeResche, 1992). Collectivists, on the other hand, tend to view conflict as an aberration, at least where in-group

relationships are concerned (LeResche, 1992). They dislike direct personal confrontation and almost always operate by consensus in order to avoid it (Christopher, 1987).

Among collectivists, avoidance is a common, often preferred, approach to conflict (Triandis, 1995; Augsburger, 1992; LeResche, 1992). Ohbuchi, Fukushima, and Tedeschi (1999) studied the influence of cultural values on how people make decisions when dealing with conflicts. The authors identified four major tactics, each one consisting of several sub-tactics: conciliation, assertion, third-party intervention, and avoidance. A conciliation-tactic is defined as the consolidation of one's and the other's goals or to indirectly communicate one's expectations. Assertion is defined as the act of strongly asserting one's request. Third-party intervention is defined as an attempt to seek help or advice and avoidance is seen as a passive tactic in order to avoid confrontation. Conciliation and assertion are direct tactics to deal with conflicts. Third-party intervention and avoidance are indirect strategies. Results show that the individualistic cultures prefer assertive and confrontational strategies for resolving conflicts tactics and the collectivist cultures favor avoidance tactics. People with collectivist values pay much more attention to the social aspects of problems, are more sensitive to social consequences of their actions (Triandis, 1994) and especially seek context information in uncertain and complex situations.

The perception of conflict affects in turn *participation in mediation*. Under most circumstances in individual cultures, attendance at a mediation session is an admission that a dispute exists. Given their view of conflict as a natural phenomenon, individualists generally are able to acknowledge conflict and participate in a mediation without experiencing shame (Augsburger, 1992; Stewart and Bennett, 1991; Lederach, 1986). For collectivists, however, even an acknowledgement of conflict could cause a loss of face, and participation in a typical mediation might be an unwelcome experience. Collectivists might refuse to participate in voluntary mediation, and if mediation is unavoidable, they might exhibit signs of anxiety and confusion during the process. Collectivists' resistance to mediation, is likely to be most pronounced when the other disputants are current or former in-group members or persons with whom the collectivists wish to maintain or re-establish relationships.

Similarly, perception of conflict and conflict resolution will also affect the *styles of mediators preferred* by different cultures. Individualists tend to prefer professional mediators who have specialised training in mediation procedures. In an individualist context, the mediator is usually expected to be impartial, with no relationship to any disputant. Neutrality is a Western cultural concept of mediation, and is not necessarily the norm across cultures.

Among collectivists, there tends to be less of a concern about professional credentials and impartiality, but more of a concern that the mediator be an insider, someone who knows the parties or at least the context of their dispute (Augsburger, 1992; Lederach, 1986; Fishburne Collier, 1973). Among collectivists, there is a tendency to prefer evaluative mediators who are familiar with the context of the parties' dispute and who can suggest resolutions that will restore harmony both to the disputants and their relevant in-groups (Augsburger, 1992; Lederach, 1986). In order to avoid conflicting expectations among mediators and disputants, mediators should disclose their perceptions of proper mediator roles and attempt to ensure the disputants' understanding of and agreement with those roles.

When it comes to *participants involved in a dispute*, individualists tend to view the parties to a dispute as those who are directly involved in it. As a result, they may consider a relatively small number of people to be the appropriate participants in a mediation session. Collectivists, on the other hand, may view members of their in-group who are not directly involved as parties to a dispute. As a consequence, collectivists may believe that a relatively large number of people (mostly in-group) should participate in a mediation session (Stewart and Bennett, 1991; Augsburger, 1992; Lederach, 1986; Christopher, 1987). Mediators, who often have an individualist perspective of the relevant parties to a dispute, should avoid the automatic exclusion from their mediation sessions of all persons who are not directly involved. Rather, they should ask the disputants to identify those who are likely to attend the sessions and the reasons for each person's attendance. Careful inquiry could indicate that some participants, though not directly involved in the dispute, are to be important advisors and participants in negotiation and decision making.

There are also *different levels of formality* desired by different groups in mediation. While a typical mediation takes place indoors and often in a formal office setting, mediators tend to deal informally with the disputants, often calling them by their first names (Augsburger, 1992; Kovach, 1994; Lederach, 1986). In collectivist societies, on the other hand, outdoor and informal indoor mediation settings are common, but the use of first names among strangers or persons of unequal status is not. Collectivists also may insist upon using titles when addressing mediators and other mediation participants, while expecting similar manifestations of respect in return. Possible accommodations to collectivists could include informal office settings, non-office mediation venues and the use of last names and appropriate titles for everyone throughout the mediation session.

Same considerations need to be made when it comes to the use of *face-to-face vs. shuttle mediation*. Most mediations begin with the mediator and the disputants in the same room, often seated at the same table. After the mediator explains the ground rules, the disputants have the opportunity to explain the basis of the dispute to each other from their personal perspectives. Direct communication among the disputants is generally considered appropriate, as it provides each disputant with an opportunity to be heard and aids the mediator in the tasks of interest identification and issue clarification (Kovach, 1994; Phillips, 1994; Augsburger, 1992; Lederach, 1986). On the other hand, collectivists who prefer conflict avoidance strategies may find the direct approach of an initial joint session uncomfortable, or even a loss of face. In collectivist societies, it is more common for a mediation to commence with private meetings between the mediator and one party. The mediator acts as a shuttle diplomat carrying information and settlement ideas from one party to the other. Once the general outline of an agreement is reached, the disputants may agree to meet in order to negotiate the details (Augsburger, 1992; Lederach, 1986; Fishburne Collier, 1973).

There exist also *differences in negotiation patterns* with regards to the individualism-collectivism dimension. Mediation models in the Western Europe are strongly influenced by individualist negotiation patterns, which tend to be direct, linear and task-oriented. In a typical mediation, an initial fact-gathering stage usually is followed by interest identification, issue clarification, and generating options.

Individualists tend to be autonomous decision makers. As such, they are more concerned with how an option affects them than with how it affects others. In a successful mediation, issues are resolved, usually one at a time, and a settlement is documented in a written agreement (Kovach, 1994; Phillips, 1994; Augsburger, 1992; Lederach, 1986).

Among collectivists, high context, and polychronic cultures, negotiation styles tend to be indirect and relationship-oriented. At the outset of a negotiation, considerable time may be spent establishing a relationship of trust upon which further negotiation can be based. Interests sometimes are expressed through the use of metaphors and body language and can be missed by someone unfamiliar with the relevant cultural context. Issues often are seen as interrelated, thus requiring a holistic approach to resolution. A holistic approach may lead to a spiral negotiation technique whereby issues are resolved hypothetically or tentatively and revisited later. Resolution options are considered not only on the basis of their effects on the disputants, but also in view of the likely effects on in-groups, who may need to be consulted before a final agreement is reached. Collectivists tend to be more interested in the restoration of overall harmony than in written agreements, especially where in-group relationships are concerned (Augsburger, 1992; Lederach, 1986; Fishburne Collier, 1973)

Individualist and collectivist participants in mediation may misunderstand each other's intentions and become frustrated with each other's negotiation styles. For example, individualists can misinterpret collectivists' preference for establishing trust before proceeding with negotiations as a delay tactic, while collectivists may perceive individualists' preference for getting-to-the-point as rude. Collectivists may be offended by individualists' frank and direct statement of demands during negotiations, while individualists may miss subtle communication signals and become frustrated with collectivists' inability to say simply 'yes or no'. Individualists who quickly evaluate options and decide upon a course of action may not understand collectivists' more deliberate, consensus-based approach to decision making. If individualists attempt to rush a decision, collectivists may feel pressured to make an agreement without consulting appropriate in-group members. In each of these events, an effective mediator acts as a cultural bridge between the participants by

explaining to them the possible bases of their misunderstandings and encouraging them to be patient with, and nonjudgmental of, each other.

4.3.3. Application of the cultural awareness to mediation

Clearly the answer of the cultural challenge to cross cultural family mediation is cultural awareness and balance. The German model of mediating international parental child abduction cases set down in the Wroclaw Declaration²¹ uses two mediators--one man and one woman. One is from the legal realm and the other from the psycho-social sphere and ideally each is from the same country as one of the parties. In any case two mediators should be present in the bi-national mediation, of whom at least one speaks the language of the other partner. They should also be familiar with the respective legal rules and cultural idiosyncrasies of the other country, or be prepared to familiarize themselves with them (Carl and Wicke, 2007). Other issues are often addressed, such as access, custody, residence, and maintenance. The German system relies on the fact that if both mediators originate from both cultural and legal systems, then both parents will feel better understood and be more likely to comply with any result coming from the mediation.

Similarly, the European Parliament Mediator for International Parental Child Abduction, which was established in 1987, initially used two mediators: one man and one woman, one lawyer and one non-lawyer, each mediator fluent in both languages of the parties in the dispute²², although this is no longer the case. The Hague Permanent Bureau has suggested that in current mediation programs, countries have opted to use two mediators, one from each nationality of each parent (Vigers, 2006). The Permanent Bureau suggests that while this arrangement is a good reason for the mediation to appear impartial, however, it has also noted that this may detract from impartiality, as a parent may identify with his or her co-national mediator and feel that this person could be an ally or provide him or her legal counsel.

²¹ <http://www.mikk-ev.de/english/codex-and-declarations/wroclaw-declaration>

²² European Parliament, *The Role of the Mediator for International Parental Child Abduction*, at 2 (2007), <http://www.europari.europa.eu/parliament/public/staticDisplay.do?language=EN&id=154> (last visited Apr. 20, 2012).

In a mediation that involves multiple cultures, it is imperative that a mediator be trained to deal with additional issues, beside the basic access schedule and custody, like religion, language, and traditional upbringing. These issues are not usually part of a mediation agreement and not often addressed by a court, but are very relevant in international parental child abduction mediations.

In assessing a parent's culture, the mediator should start by asking the parents to introduce themselves in their own words, instead of simply reading about the parent in a file. The way they introduce themselves and what they stress as important will demonstrate a glimpse of their cultural views - whether they focus on their family, their history, their education, their career, etc. Mediators must also reflect upon their own mediation training. Some of the skills learned as part of a mediation training, such as active listening or summarising what has been said, do not translate well into other cultural contexts. Mediators should be prepared to have their authority questioned, either directly or indirectly.

As we mentioned before, in some cultures, particularly Middle Eastern settings, professionalism is not a sufficient or legitimate base for intervention in a public or community conflict and certainly not in interpersonal disputes. Legitimacy is gained through the third party's relationship and influence on one or more of the parties. Such legitimacy is derived from age, clan, tribe, political position or other sources of social status, and not from neutrality or impartiality. Mediators must recognise that many cultures prefer non-neutral intervenors, especially for personal and private disputes. Often the parties also require other stakeholders' involvement to reach a decision they feel is best for the child, such as grandparents. Even if a mediator is meant to be a neutral individual, whether by the mediator's choosing, the mediator is never really neutral, but brings forth his or her own cultural biases, whether overt or internal.

Mediators should explore certain tools often used by other cultures in intervention, even if uncomfortable or unfamiliar, such as stories that will allow others from a different culture to see things from a different viewpoint, rituals that allow acknowledgment of feelings, myths that highlight embedded values and ways of being, and metaphors that can convey nuances and limitations of the mediator.

The mediator can also consider talking about the cultural differences with the parties. Taking assistance of co-mediators who are culturally similar to the parties, can have positive reassuring impact during negotiations. This does not mean that mediators from the same culture will understand their counterpart parties, but the perception of similarity that the parties perceive can be important to establish trust in the process and in the mediator.

Having said all, it is important to keep in mind that culture is a superficial overlay that covers a universal human nature or culture, and that many of the dimensions we have written about in this report are theoretical 'constructs'. It is the coalescence of many different factors, including individual nature and human culture that need to be considered in order to bring about an effective mediation between disputing parties (Wright, 1998; Savage, 1996; Larson, 2003; Stringer, 2001; Myers and Filner, 1993).

5. FAMILY MEDIATION IN EUROPE

5.1. Development of family mediation in Europe

Although mediation is at varying stages of development across Europe, in general, family mediation has taken similar steps in all the European countries. As professionals who deal with family conflicts, discovered mediation, they organised themselves in associations for the promotion and practice of mediation. Once organised, they were able to push national legislatures to consider mediation a useful mechanism for the resolution of conflicts arising out of separation or divorce. As a result, family mediation has largely obtained legal regulation or has been dealt with within the broader framework of rules regarding mediation in civil and commercial matters (Casals, 2005). In general, all countries in Europe have implemented some alternative dispute resolution in family law.

In the countries that have been under Soviet influence for decades, as well as some Balkan countries, institutionalised family mediation is still in its beginnings, which means either that these countries are still struggling with having mediation in the law, establishing the profession of family mediation, and/or implementation. In some countries in this group, there is even a certain overlap between and confusion about the terms reconciliation, counselling and mediation.

The same confusion characterises some of the Southern European countries as well. The situation in that region seems nevertheless to be very diverse, with some countries still being at a non-existing stage for family mediation, some at an experimental stage, and some already at a very structured implementation.

Quite different seems to be the situation in the Nordic countries, where we notice pioneer developments in the field of mediation since its beginnings. Although, the countries are not all at the same point in these developments, what characterises these countries seems to be the existence of mandatory mediation in some of the countries and under certain circumstances, the implementation of mediation by state services, and also their continuous experimental developments on the matter.

Rather avant-garde are the developments in Western Europe, where mediation has been flowing since the last 20 years. What we notice in these countries is the existence of strong national associations of family mediation around which the profession is organised and codes of conduct are produced. Sometimes these associations seem to have conflicting views on who should offer mediation, what professional knowledge and credentials a mediator should have, and what the training standards should be. Nevertheless, mediation is well regulated by law in most of these countries, and family mediation has established itself institutionally and professionally. Despite this positive picture of family mediation in these countries, not too many people benefit from mediation, so the implementation remains rather modest compared to the potential. The debate in these countries moves around whether mediation should be compulsory or remain voluntary, and on how to expand referrals and to create promotion and awareness.

5.2. Family mediation through the lens of the EU

The fact that family law is now being dealt with at the EU level was not a common assumption a few years ago. No later than in 1999, the European Court of Justice (ECJ) stated clearly that family law belonged *exclusively* within the competence of the Member States. At the EU level, the European Council, a meeting of the heads of state or government of the current 27 EU members, and the European Commission, the legislative branch of the EU, have worked to harmonize policies and encourage EU member states to adopt common family law standards and programs.

The EU is aware of the major role that alternative dispute resolution can play in resolving cross-border family disputes involving matters relating to custody and access rights, therefore, a number of international instruments have been prepared. These instruments, often in the form of conventions and recommendations, either aim to further law reform in EU Member States or to promote the harmonization of the laws by providing a framework for cooperation between EU members to improve the legal protection of the family, particularly that of children.

Mediation in civil matters within the European Union has had generally three separate strands: (a) civil and commercial disputes, (b) consumer rights i.e.

resolution of disputes with the individual consumer often of small value, (c) family disputes including, in particular, disputes involving children. The basic framework for the establishment and regulation of alternative processes for the resolution of family disputes (particularly in the area of divorce matters and custody cases of children) is contained in Recommendation No R (98)1 of 1998. This legal instrument is the first to establish the main directions and basic principles concerning family mediation and it covers a range of critical spheres (including the scope of mediation, organisation, promotion, status of mediated agreements, the relationship between mediation and judicial and other proceedings and international family mediation). The aim of this Recommendation is not only to reduce the workload of the courts, but it is also meant to create a better and more acceptable solution for the parties and (in the case of children) to better protect the welfare of children.

The Recommendation to governments is two-fold: first, to introduce and promote family mediation or where necessary strengthen existing family mediation; and secondly, to take or reinforce all measures they consider necessary with a view to the implementation of a number of principles for the promotion and use of family mediation as an appropriate means of resolving family disputes. All these principles touch on matters that affect professional conduct and standards. It is stated unequivocally that mediation should not in principle be compulsory (s 11a). Detailed recommendations go to qualifications, experience, training (including the teaching of theoretical and specialist substantive knowledge) and practice under expert supervision, as part of the provision of standards. Equally important is the monitoring of those standards.

At the Council of Europe, the Conference of European Ministers of Justice and the European Conference on Family Law are the bodies that are concerned with the law as it relates to the family and children. Already at the Vienna European Council in 1998, the heads of state voiced their approval to an action plan of the European Council and of the Commission regarding, among other matters, measures to “examine the possibility of drawing up models for non-judicial solutions to disputes with particular reference to transnational family conflicts” and arrangements for the implementation of the relevant provisions of the Treaty of Amsterdam. The adopted recommendation on family mediation urges the governments of member states of the

Council of Europe to “introduce or promote family mediation or, where necessary, strengthen existing family mediation” and take measures to implement a set of principles for these purposes.

Subsequently, the European Council has issued several directives and recommendations that contain guidelines, addressed to national governments or conventions that outline obligations that are binding on contracting States. For example, in 1999, the *European Council* meeting in Tampere called for alternative extra-judicial procedures to be created by the Member States. In 2000 the *Council of Europe* recommended that an alternative dispute resolution (ADR) in civil and commercial matters could simplify and improve access to justice.

Moreover, over the last three decades, the European Ministers of Justice have examined a number of family laws and child rights issues at several conferences, including, one in Strasbourg in 1998, which was devoted to “family mediation in Europe.” Subsequently, a Contact Convention was adopted regarding trans-frontier access to children and safeguards for the return of children after access was accomplished. This treaty also encourages member states to adopt similar provisions in their national legislation to standardize the process on domestic levels, thereby facilitating international cooperation.

In 2002 the *European Commission* launched a Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters which formed the basis of a European Code of Conduct for Mediators. In 2002, in a Green Paper on ADR, the European Commission makes a significant distinction between ADR conducted by the court or entrusted by the court to a third party and emphasizes the function of ADR “as a means of achieving social harmony and its political priority.” This was the preparative work for the Directive on certain aspects of mediation in civil and commercial matters, adopted on 21 May 2008.

The second Malta Judicial Conference on Cross-Frontier Family Law Issues agreed in March 2006 that the activity in the field of international family mediation and conciliation should be intensified. The Conference recommended that legal processes concerning parental disputes over children should be structured so as to encourage

parental agreement and to facilitate access to mediation and other means of promoting such agreement. However, this should not delay the legal process. International family mediation should be carried out in a manner which is sensitive to cultural differences.

The Hague Conference on Private International Law recommended in its Special Commissions of 2001 and 2006 that Contracting States should encourage voluntary return whenever possible. One of the approaches, suggested at these Special Commissions is the referral of parties to a specialist organisation providing an appropriate mediation service (mediation points). The Special Commission of 2006 added that it welcomes mediation initiatives and projects which are taking place in Contracting States.

Furthermore, the Permanent Bureau of the Hague Conference has undertaken a feasibility study on cross-border mediation in family matters. Within this study, the observation was made that as a medium-term goal in Member States, one should consider the introduction of special training courses for mediators working in cross-border family mediation. The Permanent Bureau continued its work in the framework of the third Malta Declaration (cfr supra Malta Judicial Conference) and has developed a Good Practice Guide on cross-border mediation in the context of international child abduction for its Special Commission in June 2011²³.

The EU has also sought, through the enactment of several Brussels Regulations to create ADR based on a system of cooperation between Central Authorities which can be called upon to play an active role when it comes to guaranteeing the effective exercise of parental responsibility, including through the promotion of ADR. Further European initiatives have rapidly expanded developments towards the regulation of ADR and mediation in particular, to include the European Code of Conduct for All Mediators (Civil, Commercial and Family) launched in 2004, and the Mediation Directive (on cross-border disputes) adopted in 2008. The Directive 2008/52/EC on mediation in civil and commercial matters was adopted on 23 April 2008.

²³ More on the Guide in the following sub-section

The EU Mediation Directive (2008) applies when two parties who are involved in a cross-border dispute voluntarily agree to settle their dispute using an impartial mediator. EU member states are to make sure mediated agreements can be enforced. Furthermore, the *Directive 2008/52/EC* on certain aspects of mediation in civil and commercial matters puts into place a set of minimum regulations for cross-border mediation in civil and commercial matters and has entered into force in 20 Member States in May 2011. This Directive on cross-border mediation states in article 4, 2 that Member States should encourage the initial and further training of mediators in order to ensure that the mediation is conducted in an effective, impartial and competent way in relation to the parties.

The general opinion in the Commission is that cross-border legal disputes among the EU-27 member states are best resumed through mediation rather than through courts. The European Commission reiterated at the end of August 2010 the potentials of existing EU-rules on mediation in cross-border legal disputes; the Commission reminded the EU-27 that these measures can only be effective if put in place by all the member states at national level. If mediation fails, disputes can always revert to traditional court proceedings.

5.3. European and international legislation on international family mediation

As mentioned above, several European and international legal instruments contain a ground for the promotion and the use of mediation to resolve international family disputes. Extensive work has been done on this matter by the Hague Conference on Private International Law and the Council of Europe, but also by the European Parliament, the European Commission and the Malta Judicial Conferences.

This section provides a detailed overview of all relevant and important texts, such as: Conventions, Recommendations, Regulations, Directives and Good Practice Guides on European and broader international level, which mention or refer to international family mediation as a dispute resolution method.

The United Nations Convention on the Rights of the Child

General

The Child Rights Convention was adopted on 20 November 1989 and establishes the civil, political, economic, social, health and cultural rights of children. Among those rights, the Convention establishes the right for every child to maintain personal relations and direct contact with his both parents on a regular basis, even when the parents reside in different States or when the child is separated from one of his parents²⁴.

Mediation

According to article 11 States Parties shall take appropriate measures to combat illicit transfer and non-return of children abroad. Although mediation is not explicitly mentioned in the Convention, article 3 establishes that the States Parties must consider the best interest of the child when taking any action or measure concerning children. This can be interpreted as an implicit reference to family mediation, since the amicable resolution of a family conflict is in the best interest of the child.

The Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction

General

The 1980 Hague Child Abduction Convention was established to combat and resolve child abduction, and therefore provides a system of cooperation between Central Authorities as well as a quick procedure for the return of the child to the country of his/her habitual residence.

The Convention has two main objectives, as set out in Article 1. The first one is to protect children from the harmful effects of cross-border abductions by securing the prompt return of children who have been wrongfully removed to or are retained in another Contracting State²⁵. The second objective is to ensure that the rights of

²⁴ United Nations (1989), *Convention on the Rights of the Child*, via http://en.wikisource.org/wiki/UN_Convention_on_the_Rights_of_the_Child, article 9.3 and article 10.2
²⁵ Permanent Bureau of the Hague Conference on International Private Law (1980), *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, via http://www.hcch.net/index_en.php?act=conventions.text&cid=24, article 1 a),

custody and access under the law of one Contracting State are effectively respected in the other Contracting States²⁶.

To realize these objectives, the Convention is based on a presumption that the wrongful removal or retention of a child in another country is not in the best interest of the child. Such a wrongful removal or retention would be breaching the children's right to have contact with both their parents²⁷, foreseen in article 9.3 and 10.2 of the 1989 United Nations Convention on the Rights of the Child. Although the 1980 Convention pre-dates the 1989 Child Rights Convention, it already implemented those rights as established in the Child Rights Convention.

The Hague Child Abduction Convention sets out a procedure for the return of the child to the country of his habitual residence²⁸ and for the respect of custody and access rights²⁹. The Convention also foresees the possibility that the return of the child can be refused under certain conditions³⁰. In order to realize the missions and actions as set out in the Convention, every Contracting State should appoint a Central Authority³¹.

Mediation

Although mediation is not explicitly mentioned in the 1980 Convention, the finding of an amicable solution is encouraged and a ground for it can be found in several articles of the Convention. In the description of the role and missions of the Central Authorities, article 7 c) foresees that "they [Central Authorities] shall take all appropriate measures to secure the voluntary return of the child or to bring about an amicable resolution of the issues". Furthermore, article 10 states that "the Central Authorities of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child". Finally, article 21 states that "The Central Authorities are bound [...] to promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise

²⁶ *Ibid.*, article 1 b)

²⁷ *Outline on the Hague Child Abduction Convention* (2008), via www.hcch.net

²⁸ Permanent Bureau of the Hague Conference on International Private Law, *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, *op.cit.*, article 8 - 20

²⁹ *Ibid.*, article 21

³⁰ *Ibid.*, article 13

³¹ *Ibid.*, article 6

of those rights may be subjects. The Central Authorities shall take steps to remove, as far as possible, all obstacles to the exercise of such rights”.

From the above mentioned articles, it is clear that the 1980 Convention has a clear and strong wish to promote the finding of amicable solutions in situations of child abduction and when it comes to the respect of custody or contact rights.

The Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children

General

The 1996 Hague Child Protection Convention has a broader scope than the 1980 Convention since it addresses a wide range of civil measures regarding to the international protection of children, not only related to matters of parental authority or contact and access rights. The Convention elaborates a legal framework in order to facilitate an efficient international cooperation in matters of cross-border issues of child protection and to avoid legal and administrative conflicts between the different existing legal systems.

The objectives of this Convention, mentioned in article 1, are:

- a) to determine the State whose authorities have jurisdiction to take measures directed to the protection of the person or property of the child;
- b) to determine which law is to be applied by such authorities in exercising their jurisdiction;
- c) to determine the law applicable to parental responsibility;
- d) to provide for the recognition and enforcement of such measures of protection in all Contracting States;
- e) to establish such cooperation between the authorities of the Contracting States as may be necessary in order to achieve the purposes of this Convention.

The Convention applies amongst others to children who are subject of international parental disputes over custody or contact and to those who are subject of international child abduction³².

Regarding situations of international child abduction where the 1980 Hague Child Abduction Convention is applicable, there is no substitution or amendment of this Convention by the 1996 Hague Child Protection Convention. In those cases, the 1996 Convention strengthens and complement the 1980 Convention with certain useful provisions³³. This is set out in article 50 of the 1996 Convention.

Mediation

Mediation is explicitly mentioned in article 31 b) of the 1996 Child Protection Convention. According to this article “the Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to: [...] b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection or property of the child in situations to which the Conventions applies”.

The European Convention on the Exercise of Children’s Rights adopted by the Council of Europe on 25 January 1996

General

In its first article, the European Convention on the Exercise of Children’s Rights defines the scope and object of the Convention: “The object of the present Convention is, in the best interests of children, to promote their rights, to grant them procedural rights and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority”³⁴. The Convention is

³² Permanent Bureau of the Hague Conference on Private International Law (2011), *Revised draft practical handbook on the operation of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, via <http://www.hcch.net/upload/wop/abduct2011pdo4e.pdf>, p.5

³³ *Ibid.*, p. 87

³⁴ Council of Europe (1996), *European Convention on the Exercise of Children’s Rights*, via <http://conventions.coe.int/Treaty/en/Treaties/html/160.htm>, article 1.2

applicable to family proceedings, in particular those involving the exercise of parental responsibilities such as residence and access to children³⁵.

Mediation

Mediation is explicitly mentioned in this convention under article 13: “In order to prevent or resolve disputes or to avoid proceedings before a judicial authority affecting children, Parties shall encourage the provision of mediation or other processes to resolve disputes and the use of such processes to reach agreement in appropriate cases to be determined by Parties”.

Recommendation No R (98) 1 of 21 January 1998 on Family Mediation

The Council of Europe adopted the Recommendation No. R (98) 1 on Family Mediation, on 21 January 1998. This recommendation was adopted to encourage States to introduce and promote family mediation, or to strengthen existing family mediation where necessary. With this recommendation, the Council of Europe also defined principles to ensure the quality of family mediation, and requested adherence of the member States to those principles³⁶. The principles are addressed to national family mediation as well as to international family mediation.

Regarding to international family mediation specifically, the Recommendation says that this type of mediation “should be considered as an appropriate process in order to enable parents to organize or reorganize custody or access, or to resolve disputes arising following decisions having been made in relation to those matters”³⁷.

Recommendation Rec (2002) 10 of 18 September 2002 on Mediation in Civil Matters

³⁵ *Ibid.*, article 1.3

³⁶ Council of Europe (1998), *Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation*, via [http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec\(98\)1%20E.pdf](http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/Rec(98)1%20E.pdf), article 11.i.; Permanent Bureau of the Hague Conference on Private International Law (2011), *Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. PART V – Mediation*, via <http://www.hcch.net/upload/wop/abduct2011pd05e.pdf>, p. 17

³⁷ Council of Europe (1998), *Recommendation No. R (98) 1 of the Committee of Ministers to Member States on Family Mediation*, *op cit.*

On 18 September 2002, the Council of Europe adopted a Recommendation on mediation in Civil Matters. This recommendation has a broader scope than the Recommendation No. R (98) 1 on Family Mediation, as it describes further principles relating to mediation in civil matters in general³⁸. With this recommendation, the Council encourages Member States to facilitate mediation in civil matters whenever appropriate and to take or reinforce all measures considered necessary to the progressive implementation of the Guiding Principles on mediation in civil matters as set out in the Recommendation³⁹. The Recommendation also contains special principles regarding to facilitating the use of mediation for conflicts with an international element⁴⁰.

The Convention on Contact Concerning Children of 15 May 2003

General

The objectives of this Convention are to determine general principles to be applied to contact orders, to fix appropriate safeguards and guarantees to ensure the proper exercise of contact and the immediate return of children at the end of the period of contact, and to establish cooperation in order to promote and improve contact between children and their parents and other persons having family ties with children⁴¹.

Article 4 and 5 of this Convention sets outs the right for children to have and maintain regular contact with their parents and other persons having family ties with the child.

Mediation

The Conventions states that the judicial authorities of the Member States shall encourage the reaching of amicable agreements , in particular through the use of

³⁸ Permanent Bureau of the Hague Conference on Private International Law (2011), *Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. PART V – Mediation*, op. cit., p. 17

³⁹ Council of Europe (2002), *Recommendation Rec (2002) 10 of the Committee of Ministers to Member States on Mediation in Civil Matters*, via <https://wcd.coe.int/ViewDoc.jsp?id=306401&Site=CM>

⁴⁰ *Ibid.*

⁴¹ Council of Europe (2003), *Convention on Contact Concerning Children*, via <http://conventions.coe.int/Treaty/en/Treaties/Html/192.htm>, article 1

family mediation and other similar processes, when it comes to resolving disputes concerning contact⁴².

Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000

General

The Council Regulation (EC) No 2201/2003 of 27 November 2003, also known as the Brussels II bis Regulation, applies to civil procedures relating to divorce, separation and marriage annulment, as well as to all aspects of parental responsibility. The Brussels II bis Regulation establishes rules on jurisdiction, specific rules on child abduction, rules on recognition and enforcement, and on cooperation between Central Authorities.

Regarding child abduction, the 1980 Hague Child Abduction Convention will remain applicable, but the Brussels II bis Regulation will prevail for the new rules set out in this Regulation. One of the new rules of the Regulation on child abduction is that the competence of jurisdiction remains with the courts of the Member State of the habitual residence of the child immediately before the abduction. Another rule established by the Regulation is relating to the hearing of the child. Furthermore, the return of the child cannot be refused under article 13 (b) of the 1980 Hague Convention if it is established that arrangements or safeguards have been put in place in order to ensure the protection of the child after his return.

Regarding recognition and enforcement of judgments on matrimonial matters and parental responsibility and judgments on rights of contact and return of children, the Regulation establishes automatic recognition of these judgments without any intermediary procedure being required, provided that they are accompanied by a certificate issued by the court which has issued the judgment.

Mediation

⁴² *Ibid.*, article 7 b

Mediation is explicitly mentioned in article 55 e) of the European Regulation, concerning the cooperation between Central Authorities. This article provides that Central Authorities of the Member States shall take all appropriate measures to “facilitate agreements between holders of parental responsibility through mediation or other means, and facilitate cross-border cooperation to this end”⁴³.

*European Code of Conduct for Mediators of 2 July 2004*⁴⁴

A large number of organizations and individuals composed of skilled practitioners and experts in the field of mediation, together with the assistance of the European Commission, developed the “European Code of Conduct for Mediators”, that was launched on 2 July 2004⁴⁵. This Code of Conduct establishes a number of principles to which individual mediators or mediator associations working in the field of civil and commercial mediation, can voluntarily engage themselves to respect, under their own responsibility.

The Code of Conduct for mediators sets out principles regarding the modalities of the mediator’s services, independence and impartiality of the mediator, the mediation process and agreement, and confidentiality of the mediation.

This European Code of Conduct has already been adopted by multiple mediators or existing mediators associations throughout Europe, or has served as an inspiring ground to others for the elaboration of their own code of conduct.

European Directive on certain aspects of mediation in civil and commercial matters of 21 May 2008

On 21 May 2008, the European Parliament and the Council of the European Union concluded the European Directive on certain aspects of mediation in civil and

⁴³ Council of the European Union (2003), *Council Regulation (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000*, via <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003R2201:EN:NOT>, article 55 e)

⁴⁴ European Code of Conduct for Mediators (2004), via http://ec.europa.eu/civiljustice/adr/adr_ec_code_conduct_en.pdf

⁴⁵ Permanent Bureau of the Hague Conference on Private International Law (2011), *Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. PART V – Mediation*, op. cit., p. 17

commercial matters. This Directive sets out rules, principles and expectations, which had to be implemented by the Member States by 21 May 2011 at the latest.

The objective of the Directive is to “facilitate access to alternative dispute resolution and to promote the amicable settlement of disputes by encouraging the use of mediation and by ensuring a balanced relationship between mediation and judicial proceedings”⁴⁶. The disputes to which the Directive applies to are cross-border disputes⁴⁷, which are defined as disputes where the parties are domiciled or habitually resident in different Member States⁴⁸.

In its article 4, the Directive seeks to ensure the level of quality of mediation by stating that Member States shall encourage the development of, and the adherence to, voluntary codes of conduct by mediators and mediation organizations, as well as other mechanisms to control the quality of the provided mediation services⁴⁹. Member States shall also encourage initial and further training of mediators in order to ensure an effective, impartial and competent way of providing mediation⁵⁰.

The Directive foresees that parties to a dispute may be invited to use mediation or to attend an information session about mediation, by the court before which the dispute is brought⁵¹. Article 6 of the Directive establishes that the content of a written mediation agreement must be ensured to be made enforceable on the request of the parties.

The confidentiality of Mediation is developed in article 7 of the Directive. According to this article Member States shall ensure that mediators or others involved in a mediation process shall not be obliged to disclose any information regarding to the mediation during judicial proceedings.

⁴⁶ European Parliament and Council of the European Union (2008), *Directive 2008/52/EC of the European Parliament and the council of 21 May 2008 on certain aspects of mediation in civil and commercial matters*, via <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:136:0003:0008:En:PDF>, article 1 §1

⁴⁷ *Ibid.*, article 1 §2

⁴⁸ *Ibid.*, article 2 §1

⁴⁹ *Ibid.*, article 4 §1

⁵⁰ *Ibid.*, Article 4 §2

⁵¹ *Ibid.*, Article 5

When parties choose to settle their dispute by mediation, it must be ensured by Member States that they are not prevented to initiate judicial proceedings because of the expiration of limitation or prescription periods during the mediation process⁵².

The Directive provides the obligation for Member States to ensure that the general public can easily find information on how to contact mediators or mediation organizations, in particular through the Internet⁵³.

At the deadline of 21 May 2011, 20 Member States had rules in place to implement the Directive. The 6 member States which failed to implement the Directive in time are Cyprus, the Czech Republic, France, Luxembourg, the Netherlands and Spain.

Other work of the Hague Conference on Private International Law

Several Guides to Good Practice developed by the Hague Conference on Private International law states the importance to promote amicable solutions.

Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice

This Guide to Good Practice on Central Authority Practice was published by the Hague Conference in 2003 and contains a range of good practices developed through experience over the years, and which have resulted in effective implementation of the 1980 Convention⁵⁴.

In the section regarding the role of the requested Central Authority, the Good Practice Guide states that Central Authorities should take all appropriate steps to initiate a voluntary return of the child, in accordance to article 7 c) of the 1980 Convention⁵⁵. To this end, Central Authorities may refer the parties to a specialized organization providing mediation services. Regarding to contact applications, the

⁵² *Ibid.*, Article 8

⁵³ *Ibid.*, Article 9

⁵⁴ Permanent Bureau of the Hague Conference on Private International Law (2003), *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I – Central Authority Practice*, via http://www.hcch.net/upload/abdguide_e.pdf, p. 7

⁵⁵ *Ibid.*, point 4.12, p. 49-50

requested Central Authority should also consider if it is possible to reach voluntary contact arrangements⁵⁶.

Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures

This guide was published in 2005 and its objective is to give guidance as to the type of preventive measures that States might consider to implement in order to reduce the incidence of child abduction⁵⁷.

As a preventive measure to child abduction, the guide mentions the promotion of voluntary agreements and the facilitation of mediation for issues of custody or contact⁵⁸. The Guide even states that the advantages of providing specialized mediation for couples involved in cross-cultural relationships should be considered.

General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children

This Guide was established by the Hague Conference in 2008. The objective is to promote consistent and best practices in relation to matters of transfrontier contact concerning children. The Guide draws the attention to certain general principles that Contracting States have to consider when adopting policies regarding international contact cases⁵⁹. It was designed to strengthen the more effective implementation and application of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, but also to provide an overall model for an international system of cooperation to secure effective respect of contact rights⁶⁰. The Guide was also influenced by the Malta Declarations of 2004 and 2006, by the 2003 Convention on Contact Concerning Children and by the Brussels II bis Regulation of 2003⁶¹.

⁵⁶ *Ibid.*, point 5.26, p. 66

⁵⁷ Permanent Bureau of the Hague Conference on Private International Law (2005), *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III – Preventive Measures*, via http://www.hcch.net/upload/abdguideiii_e.pdf, p. vii

⁵⁸ *Ibid.*, point 2.1.1, p. 15-16

⁵⁹ Permanent Bureau of the Hague Conference on Private International Law (2008), *General Principles and Guide to Good Practice on Transfrontier Contact Concerning Children*, via http://www.hcch.net/upload/guidecontact_e.pdf, p. xxiii

⁶⁰ *Ibid.*, p. vii

⁶¹ *Ibid.*, p. xxiv

The general principle of this Good Practice Guide is that “all possible steps should be taken to secure the rights of children to maintain personal relationships and have regular contact with both of their parents and of parents to maintain personal relationships and have regular contact with their children, unless it is determined that such contact is contrary to the interests of the children. This is equally applicable when the parents live in different countries”⁶².

This Good Practice Guide promotes parental agreement and encourages the achievement of agreed solutions by mediation or other ways⁶³. It states that confidentiality, impartiality and independence of mediation should be guaranteed, that mediators should receive specialized training regarding to cross-border family disputes, that the establishment of and adherence to voluntary codes of conduct should be promoted , and that the child’s views should be considered in mediation⁶⁴. The Guide also mentions that agreements reached through mediation or other ways of alternative dispute resolution should have cross-border effect and should be made enforceable in both States concerned⁶⁵.

Principles for the Establishment of Mediation Structures in the Context of the Malta Process

The Malta Process is a dialogue between judges and experts from Hague Convention States as well as from non-Convention States, in cooperation with the Hague Conference on Private International Law. This dialogue focuses on the improvement of cooperation between the participating States to resolve difficult cross-border family conflicts, concerning child custody, contact and child abduction. Three Conferences on Cross-Frontier Family Law Issues took place in Malta in 2004, 2006 and 2009. At each of these conferences, a Declaration was issued by the participants. All three Malta Declarations point out the importance of promoting the use of mediation in international family conflicts.

⁶² *Ibid.*, point 1.1, p. 4

⁶³ *Ibid.*, point 2.1 and 2.2, p. 6

⁶⁴ *Ibid.*, point 2.4, p. 8

⁶⁵ *Ibid.*, point 2.5, p. 11

The third Malta Declaration recommended the creation of a Working Party to draw up an action plan for the development of mediation services in order to assist in the resolution of cross-border disputes concerning custody of and contact with children⁶⁶. This Working Party was composed of mediation experts from Contracting States and non-Contracting States to the 1980 Hague Child Abduction Convention. Together with the assistance of the Permanent Bureau of the Hague Conference on Private International Law, the Working Party established Principles for the Establishment of Mediation Structures in November 2010.

The first part of those Principles relates to the designation of Central Contact Points for international family mediation in each participating States, to the information on mediation services in international family mediation that should be provided by those Central Contact Points and to how this information should be made accessible through the Contact Points⁶⁷. In the second part, the principles refer to certain standards regarding the identification of international mediation services by the Central Contact Points, the mediation process and the mediation agreement⁶⁸. In the last part, the Principles recognize the importance of the enforceability of mediation agreements⁶⁹.

Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part V – Mediation

This Draft Good Practice Guide was established by the Hague Conference in May 2011. The objective of this Guide is the promotion of good practices for mediation and other ways of reaching an agreed solution in international family disputes concerning children. This Guide is intended to assist States Parties to the 1980 Hague Child Abduction Convention, but also States Parties to other Hague Conventions that promote the use of mediation or other ways of alternative dispute resolutions, like the

⁶⁶ *Third Malta Judicial Conference on Cross-Frontier Family Law Issues* (2009), via http://www.hcch.net/upload/maltadeclo9_e.pdf, p. 3

⁶⁷ Working Party with the assistance of the Permanent Bureau (2010), *Explanatory Memorandum on the Principles for the Establishment of Mediation Structures in the Context of the Malta Process*, via http://www.hcch.net/upload/wop/mediationmemo_e.pdf, p.iii

⁶⁸ *Ibid.*, p.iv

⁶⁹ *Ibid.*, p. iv

1996 Hague Child Protection Convention⁷⁰. Furthermore, the Guide is meant to inspire States that are not Parties to these Hague Conventions but that wish to develop the promotion of alternative dispute resolution methods for cross-border family conflicts⁷¹.

The first chapter of the Guide gives a general overview of the advantages and the risks concerning the use of mediation in international family conflicts. A second chapter explores the specific challenges of the use of mediation in the framework of the 1980 Child Abduction Convention. Chapter 3 deals with the question of the specialized training and qualifications that are necessary for mediation in international child abduction cases.

The Guide also presents good practices regarding to the following aspects of the mediation process: access to mediation, scope of mediation in international child abduction cases, mediation principles/ models/ methods, involvement of the child, possible involvement of third persons, arranging for contact between the child and the left-behind parent during mediation, accusations of domestic violence, the terms of the mediated agreement, enforceability of the mediation agreement, issues of jurisdiction and applicable law rules.

The Guide also covers the use of mediation in order to prevent child abduction. A separate chapter is dedicated to other ways of alternative dispute resolution. Finally, a last chapter concerns the special issues regarding the use of mediation in non-Hague Convention cases.

5.4. Main models, methods and styles of mediation in Europe

5.4.1. *Models of mediation*

The term model is used loosely in the mediation field, often interchangeably with style, approach, and orientation. There are several ways mediation models and

⁷⁰ Permanent Bureau of the Hague Conference on Private International Law (2011), *Draft Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. PART V – Mediation*, op. cit., p. 11

⁷¹ *Ibid.*, p. 11

practice in Europe differ depending on their economic, political, social, and cultural developments, and often also on the influences these countries had from other cultures, theoretical developments and practices. Rather than speaking about clear cut models, it seems easier to speak about axes around which they can be characterised, which often intersect in order to produce hybrid models.

A main systemic division is made around the focus of the orientation, or the purpose of mediation. In this type of characterisation, models of mediation can be divided into 6 types: *settlement-driven model* (focus on negotiations), *cognitive systemic mediation* (focus on problem solving), *therapeutic model* (focus on therapy), *transformative mediation* (focus on empowerment and recognition), *humanistic mediation* (focus on dialogue and understanding), *narrative mediation* (focus on deconstruction and reconstruction of life stories). These models are not merely methodological variations, but they also represent different values.

The *settlement-driven model* is the most well-known and also the most criticised model, especially from outside the field of business mediation. In this model, the parties are viewed as equally powerful and rational bargaining sides. The aim of the mediation is driven by self-interest, and aims to bargain a solution, whereby both parties can meet their goals, and the mediator is highly directive towards that end (Fisher and Ury, 1981). Settlement-driven mediation prioritizes reaching an agreement while providing free way for the mediator to achieve this goal. Empowerment, recognition, empathetic communication and emotional experiences are regarded as meaningful, but are not viewed as important as, for example, risk considerations. This style is a stage-based model and is often carried out with the parties separated from one another much of the time in private meetings with the mediator, who serves as a messenger between the individuals involved.

The *cognitive-systemic* style (Haynes or Milan Model)⁷² implies that cognitive is to be seen as different - than affective – that is, intellectual instead of emotional. The cognitive style of mediation was later influenced by the Milan School's systemic theory, which is the reason why the author has named the style cognitive-systemic mediation. The cognitive-systemic mediators, while making room for the parties to

⁷² Its pioneers were John Haynes and Larry Fong, who named the system the Haynes or the Milan model.

express emotions to a large or small degree and realizing that only few conflicts are without strong feelings involved, regard emotional data within mediation as not useful. Haynes and Fong found that there was too high of a risk that the parties would be tied to their pasts if the mediator actively dealt with the emotional data. Consequently, they developed a cognitive process with a cognitive empathy that starts with the present and then shifts the focus to the future. This style attempts to move the parties' concentration from the emotional (affective) to the common sense (cognitive) and decision-making. This style is influenced by systems theory, and therefore works with circular questioning, strategizing and hypotheses.

Therapeutic mediation tries to bring in emotions, and focuses on relational (past and future) well-being rather than just on negotiated outcomes. One of the major differences with the settlement-driven model is that human beings are not viewed as equally powerful and rationally able in the face of crisis and trauma, therefore healing is necessary before negotiations can be made. The term therapeutic mediation (Irving and Benjamin, 1995) implies a twofold goal: emotional healing and agreement on a plan of action. The goal of a therapeutic process is restoration of a sense of well-being. It generally takes a systemic approach to mediation, whereby the family, rather than the individual is at the center. At the same time, the focus seems to be at the transformation of the post-separation relationships, especially as they relate to the children.

Transformative mediation (Bush and Folger, 1994) is based on the values of "empowerment" of each of the parties as much as possible, and "recognition" by each of the parties of the other parties' needs, interests, values and points of view. The potential for transformative mediation is that any or all parties or their relationships may be transformed during the mediation. Transformative mediators meet with parties together, since only they can give each other recognition. In transformative mediation, the parties structure both the process and the outcome of mediation, and the mediator follows their lead. A transformative mediator aims to empower the parties involved to make their own decisions and take their own actions. This is an organic process and highly responsive to the parties' needs. The parties are very much in charge of both the content (the substantive issues) and the process, and the mediator works to support both as their conflict unfolds and the process and

relationship builds. The focus is not on agreement. When the mediator senses an opportunity for improving empowerment, dialogue or recognition, he slows down the process and returns the focus to these key ideas.

A humanistic mediation model is grounded in underlying values and beliefs about the nature of human existence, conflict, and the search for healing, like interconnectedness, dialogue, peace, growth, inner strength, self-determination that arise from embracing conflict directly. Humanistic mediation is clearly connected to humanistic psychology and person-centered therapy. A humanistic mediation model is nondirective and dialogue driven. It embraces the importance of spirituality, compassionate strength, and our common humanity. Umbreit (1995) argues that a humanistic mediation model can lay the foundation for a greater sense of community and social harmony. The humanistic approach maintains focus on the parties' agenda rather than that of the mediator. The goal is healing of trauma and peacemaking. Prior to the first joint meeting, private preparatory meetings occur. In the joint meeting each party is encouraged to have a direct dialogue with one another. Empathy, particularly from the wrongdoer, and assertion, particularly by the victim, play a significant role. The goal is to understand the event and its consequences and to neutralise the negative consequences of the conflict at hand.

Narrative mediation (Winsdale and Monk, 2001) takes a very different stance to conflict, by focusing less on negotiation and more on how people make sense of the world. By telling stories of events and by giving meaning to these events people construct their own reality. People in conflict will tell conflict stories that help them make sense of the situation, the other person and themselves. Conflict stories can be limiting and paralysing. Narrative mediators believe that for every conflict story there is an alternative story that can make co-operation and trust more available. Narrative mediators help parties rewrite new and more constructive stories. The *narrative* style assumes that neither language nor stories convey objective information. It is assumed that the parties make decisions on grounds of stories rather than facts. It is assumed that conflict is a social construction created within the language, and enhanced by the parties' place in the chosen story. The aim is to deconstruct and minimise the conflict-saturated story with the purpose of making room for an alternative story, making each party take a position in another history, and then from these new places,

with the mediator as co-author, reconstruct a new story together, in hopes of ultimately reaching an agreement.

While, each model can be applied to cases of family conflicts, it seems that the most meaningful model for these cases can be therapeutic mediation, specifically for its emphasis on emotions and relational well-being. Therapeutic mediation implies both emotional healing and agreement on a plan of action. It is important for family conflicts that this model takes a systemic approach to mediation, whereby the family, rather than the individual is at the center. At the same time, the most important point of strength is that the focus is at the transformation of the post-separation relationships, especially as they relate to the children. Nevertheless, depending on the case and context, a combination of various models can be applied.

5.1.4.2. Styles of mediation

Mediation has also been characterized around the *styles of mediation* (see Riskin, 1994, 1996) which has mostly to do with the role of the mediators. Mediators can have *evaluative and normative* roles or *facilitator* roles. While this division has been highly debated in literature, it is important to highlight here the main features that characterise each of the 'ideal' styles. At the same time, it is important to emphasise that these styles should be viewed as a continuum that characterise practice rather than clear-cut categories.

In *facilitative mediation*, the mediator structures a process to assist the parties in reaching a mutually agreeable resolution. The mediator asks questions, validates and normalizes parties' points of view, searches for interests underneath the positions taken by parties, and assists the parties in finding and analysing options for resolution. The facilitative mediator does not make recommendations to the parties, give his or her own advice or opinion as to the outcome of the case, or predict what a court would do in the case. The mediator is therefore mainly in charge of the process, while the parties are in charge of the outcome.

One of the key factors in mediation models is the notion of decision making. In facilitative mediation, any decision making is left to the parties involved, the

mediator has no decision making authority. This is based on the belief that the people involved in the situation have the best understanding of what they need for themselves and from each other. Facilitative mediation helps parties in a conflict make their own decisions, in the belief that such decision will have the best fit and therefore be highly sustainable. The mediator offers a structured process for the parties to make best use of in seeking mutually satisfactory solutions

Evaluative mediation is a process modeled on settlement conferences held by judges. An evaluative mediator assists the parties in reaching resolution by pointing out the weaknesses of their cases, and predicting what a judge or jury would be likely to do. An evaluative mediator might make formal or informal recommendations to the parties as to the outcome of the issues. Evaluative mediators are concerned with the legal rights of the parties rather than needs and interests, and evaluate based on legal concepts of fairness. Evaluative mediators most often conduct separate meetings with the parties and their attorneys, practicing “shuttle diplomacy”. They help the parties and attorneys evaluate their legal position and the costs vs. the benefits of pursuing a legal resolution rather than settling in mediation. The evaluative mediator structures the process, and directly influences the outcome of mediation.

Evaluative mediators are usually legal practitioners, often with an expertise in a particular area of law relevant to the conflict. They will provide the parties with an evaluation of the strengths and weaknesses of their case with respect to their legal positions. If asked they may also advise as to a likely outcome at court. They may also offer direction towards settlement options. There is a strong drive towards equitable settlement as an efficient and economical alternative to legal measures.

5.1.4.3. Methods of mediation

A further characterisation can be done around the modes, or methods of mediation. Mediation can be *direct or face-to-face*, where parties come together in a face to face meeting, or *indirect*, also referred to as *shuttle*⁷³ mediation, where the mediator may function as a go between, shuttling between the two parties who remain physically (and possibly temporarily) apart. The mediator may act as a simple conduit passing

⁷³ Sometimes shuttle mediation and caucus are used interchangeably, although they are not synonymous.

messages back and forth, or may actively negotiate on behalf of the disputants who obviously cannot negotiate directly.

There are three main purposes behind the use of *shuttle mediation*. It aims to avoid confrontation, both for the parties and for the mediator, where the level of conflict is high. It allows the parties to disclose confidential information to the mediator that they do not want revealed to one another. It gives the mediator the opportunity to discuss matters that would be uncomfortable to raise if parties were together (Folberg and Taylor, 1984).

In disputes following family breakdown, the disadvantages of shuttle mediation outweigh the advantages, except in special circumstances such as illness, extreme stress, or fear of intimidation, where it could (although not necessarily) be of value as a prelude to joint negotiation. A vulnerable party may feel safer only initially communicating at a distance. Alliances may more easily arise or be perceived to arise between the mediator and one party. In the absence of both parties the mediator cannot demonstrate the impartiality that is central to the mediatory role. The parties are not only denied the information derived from direct experience of each other but they do not learn how to negotiate together given that it is the mediator who does the negotiating for them. The power of the mediator and possibilities of manipulating the mediation process are thus increased. The mediator may find it tempting to exceed the messenger role, especially when negotiations are going badly. The mediator's total control over communication gives opportunities to control the substance of that communication, for example by changing an emphasis, omitting or reframing statements.

Although not a method on its own, but rather standing between face-to-face mediation and shuttle mediation, the *caucus*, a North American term, involves the mediator meeting individually with one side or a subset of a participant group (for example, lawyers only or clients only). It basically means that each party has a lawyer and the mediator sees each party and sometimes also their lawyer. The primary purpose of the caucus is to enable the mediator to gain access to information and insights that cannot be obtained in the joint meeting (Stulberg, 1987). The caucus can be used effectively for purposes of breaking an impasse in negotiations, for educating

a party in their negotiation style, and for exploring possibilities for compromise. In family disputes, the caucus allows the parties to reveal information to the mediator that they do not wish to disclose to the other party, to explore personal feelings about the issues, and discuss matters too uncomfortable or risky to raise in the joint meeting (Folberg and Milne, 1988). The caucus can be used at different stages of mediation. Three dominant approaches, depending on mediator philosophy, have been identified in relation to the use of the caucus: never caucus; the selective use of the caucus; and always or mostly caucus (Menkel-Meadow, 2005).

Confidential exchanges, whilst one of the main advantages of the caucus, also create difficulties, as they require considerable skills on the part of the mediator in keeping track of what is known, how that knowledge was obtained and from whom, and if there are constraints related to it (Menkel-Meadow, 2005). Disputants for example, have no means of knowing whether confidentiality has been breached. Despite some of the concerns, the literature confirms the usefulness of the caucus – in generating confidence, intimacy and encouragement in the negotiations. It is also found to be of pragmatic value for continuing screening for domestic abuse in family mediation (Roberts, 2007).

Another way mediation methods have been characterized is around *the number of mediators involved in the process*. The main styles in this regard are: solo mediation – one mediator; co-mediation – two mediators; and anchor mediation – where a second mediator may assist from time to time.

The *solo mediation* is the most commonly practiced method. The only particularity is that there is only one mediator involved. Many countries work still with this model, while many have started to experiment with the advantages of co-mediation. Solo mediation might have certain advantages (ex. costs less, is easier to organise) and disadvantages (ex. one mediator cannot set an example of how to negotiate, can be tiring for the mediator, and can go wrong if the mediator is not skilled or impartial), and might be more efficient in certain type of cases than others.

The *co-mediation model* occurs when two mediators, ideally one male and one female, mediate together in a particular case. In Austria and Germany, co-mediation

is carried out by two mediators where one mediator has a psycho-social basic training (as a psychotherapist, a psychologist with a social work diploma or someone who has completed this basic training and has experience in the field of family conflicts) and the other mediator has a legal basic training (such as a lawyer, a notary or even a judge, or a person who has completed legal training and is acquainted with the field of family law).

The *advantages* of co-mediation are as follows:

- Impartiality is enhanced if neither 'male' nor 'female' (or for that matter, professional or cultural) viewpoint prevails or is perceived to prevail.
- Co-mediators can set an example to the disputants of how to negotiate. Of particular value to the disputants is the way the mediators overcome their own (occasional) disagreements. Kind and considerate behaviour by the mediators can set the tone for relations between the parties.
- Co-mediators can also share the demanding task of mediating, especially in the longer single sessions. They can monitor each other's contributions, offsetting weaknesses, reinforcing messages and providing complementary skills, information and approaches, particularly if they have different professional backgrounds, for example law and psychology.

The *disadvantages* of co-mediation are:

- Problems of authority, status, competition, control and territory can arise between the two mediators, particularly when they have different professional backgrounds.
- Conflicting styles and approaches can result in confusion over strategies, timing and the division of labour, or a power struggle between the mediators.
- One mediator may dominate the process, setting a bad example to the parties.

Anchor mediation means that mediation may take place with one or two mediators as the circumstances of the mediation requires. The "anchor mediator"- will be present throughout the mediation process, a second mediator being drawn in from time to time as may be helpful. How and when a second mediator is used in anchor mediation will be a decision for the anchor mediator in discussion with the parties. Not much is known on the advantages and disadvantages of this method.

5.5. Existing programmes, trainings and organizations regarding cross-border family mediation in Europe

Several initiatives, pilot projects, bi-national projects, trainings and organizations were created and developed in different European countries regarding the use of mediation in cross-border family conflicts. This section gives an overview of the different programs, trainings and organizations existing all over Europe.

5.5.1. Programmes

Germany and France - The German-French Mediation Project

The German-French Mediation Project started in 1999, in order to offer an alternative solution to conflicts in parental authority matters that occurred in the separation of German-French couples. A German-French parliamentary mediation committee was set up, on a proposal of the Ministers of Justice of both countries. This mediation group of six parliamentary representatives consisted of three French and three German parliamentarians.

Between October 1999 and late 2002, this parliamentary mediation committee dealt with approximately 50 German-French conflicts (Vigers, 2006) involving custody and visitation, and organized “mediation” meetings, bringing together a French and a German member of parliament, the parents and any other family member involved in the dispute (Alles, 2009). In some cases the parliamentary mediator group, using one French and one German parliamentarian, could help the conflicting parties find a mutual agreement.

In February 2003, for a variety of reasons, the German-French parliamentary committee, in agreement with the Ministers of Justice of both countries, handed over these conflict situations to professional mediators. The ministers agreed further to carry out and finance a limited project of bi-national professional mediation to resolve German-French conflicts involving parents and children. This pilot project was run between 2003 and 2006 by the Mission d’Aide à la Médiation Internationale

pour les Familles (MAMIF – International Family Mediation Service) for the French Ministry of Justice and by Arbeitstab Kind for the German Ministry of Justice (Alles, 2009:2). The mediators involved in the project received training for their work as bi-national mediators, with a focus on legal as well as cultural topics⁷⁴.

The mediation model adopted in this project was a co-mediation model, with various criteria for the pairs of mediators: a French Mediator and a German mediator, a male and a female mediator, both from different professional backgrounds (Alles, 2009:3).

Regarding the involvement of the child in the mediation, the project participants agreed that it was important to involve the perspective of the child in the mediation process in an appropriate manner if the parents agreed on this. The participation of the children was experienced as positive and helpful by the mediators involved in the project (Carl and Walker, 2011).

The mediations usually took place near the place where the child was residing. This allowed that contact was arranged between the left-behind parent and the child outside the mediation sessions (Carl and Walker, 2011). The mediation was conducted in three or four sessions over one or two weekends. During this pilot project, the mediators dealt with more than 30 cases of bi-national mediation.

In 2005, the professional mediators involved in these cases created the association *Médiation Familiale Binationale en Europe* (M.F.B.E. – Bi-national Family Mediation in Europe) (Vigers, 2006).

Since 2006, the financing for this project has ended, and the work has been continued by MiKK e.V., who currently serves as advisors in German-French conflicts involving parents and children and refers to French-German co-mediation pairs from the pilot project, who in the meantime have many years of experience) (Vigers, 2006).

France - Mission d'Aide à la Médiation Internationale pour les Familles (MAMIF)

⁷⁴ The German-French Mediation Project, www.mikk-ev.de

The Mission d'Aide à la Médiation Internationale pour les Familles was created in April 2001 by the Ministry of Justice in order to help solving the increasing number of conflicts between bi-national couples, through mediation. After the creation of the French-German Parliamentary Mediation Committee, there was a big interest in this method of resolving bi-national family conflicts and the MAMIF was set up to extend the use of mediation to familial conflicts involving all nationalities, and not only to French-German couples (Ganancia, 2007). As mentioned before, from 2003 the French-German Mediation project was handed over to professional mediators and it was the MAMIF who was entrusted to carry over this task in France.

When the MAMIF was created, the initial objective was to help to set up actions of mediation in international family conflicts, but the Mission was not providing mediation itself. Mediation was understood broadly as the establishment of a communication bridge between the parents in order to help them find mutually acceptable agreements, taking everyone's interest into consideration, especially the interest of the children to maintain regular contact with both parents (Ganancia, 2007:15). The actions of the MAMIF were mainly based on negotiation, conciliation, and more political interventions with foreign authorities to encourage parents to make efforts.

From 2002, the MAMIF started to provide also mediation services. Mediation can only be started on the voluntary wish of the parents, but the MAMIF could often encourage parents to be more open to negotiate, because of its symbolic authority of being part of the Ministry of Justice (Ganancia, 2007:22). French and foreign parents were referred to the MAMIF through their lawyers, associations of parents, the family judge, the Central Authority or the Ministry of Foreign Affairs. The MAMIF dealt with 360 cases from January 2002 to April 2005 (Ganancia, 2007:21).

In 2007 this specific service regarding international family mediation was incorporated in the Central Authority, the Bureau de l'Entraide Civile et Commerciale Internationale (BECCI – Bureau of International Civil and Commercial Mutual Aid). The Bureau proposes a list of family mediators able to work in international family conflicts and also relies on liaison magistrates, consular services and local authorities

abroad to support the mediation initiated by the French Central Authority⁷⁵. A mediation can be proposed before, during or after judicial proceedings.

United Kingdom – Mediation in International Parental Child Abduction : The reunite Mediation Pilot Scheme

Reunite – International Child Abduction Centre is a UK based non-governmental organization dealing with cases of international parental child abduction. A research project “Mediation in International Parental Child Abduction – The reunite Mediation Pilot Scheme” started in 2003, with funding of the Nuffield Foundation and aimed to develop and trial a Mediation Pilot Scheme for use in international child abduction cases where a child had been abducted to, or retained within, the UK, and where the applicant parent was pursuing a Hague application for the return of the child. The pilot project lasted for 2 years and a report was made in October 2006⁷⁶.

The objectives of the project were to establish how mediation could work in legal conformity with the principles of the 1980 Hague Child Abduction Convention, to develop a mediation structure that would fit in practically with the procedural structure of an English Hague Convention case, and to test whether such a model would be effective in practice.

The mediation model developed for this pilot project was a model of co-mediation, where mediation was conducted by two independent co-mediators, not necessarily from different professional background and not necessarily from the opposite sex. Three mediation sessions of a maximum of three hours were provided over a 2-day period. The mediations conducted under this pilot project were provided free of charge.

The results were very positive: 28 cases were mediated and a Memorandum of Understanding was agreed in 21 cases, with a focus on the best interests of the child and ensuring that the child continued to have a positive relationship with both

⁷⁵ <http://www.justice.gouv.fr/justice-civile-11861/enlevement-parental-12063/la-mediation-21106.html#3>

⁷⁶ Reunite International Child Abduction Centre (2006), *Mediation In International Parental Child Abduction – The reunite Mediation Pilot Scheme*, via <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20Report.pdf>

parents and the extended family. The pilot project was evaluated by the parents, the solicitors and the mediators. A conclusion of this pilot project is that there is a clear role for mediation in resolving these types of disputes and that parents are willing to embrace the use of mediation. Even if mediation would not be appropriate in every case, it should be at least offered in all cases of parental child abduction.

After the pilot project, reunite continued doing mediation, although there was no funding anymore. Mediation is now funded by Legal Aid for the parents who can apply for it. The amount of 500 £ per parent that is granted, covers all of the mediation done by reunite. If one of the parents is not eligible for Legal Aid, he will have to pay his part of the mediation costs.

Today, reunite has two main mediators to conduct mediations and they can also rely on a pool of 5-6 external mediators that are willing to work on reunite-meditations. These are all experienced family mediators, mostly lawyers. They must have taken part in a recognized training course in mediation, they must be accredited by one of the official mediation bodies in the UK, they must be accredited by the Legal Services community, and they must have practice in family mediation. They were trained in the international matter by doing co-mediation with one of the main mediators of reunite. The last 4-5 years, reunite conducted about 90 cases and the experiences seems positive⁷⁷.

Germany and the USA – The German-American Mediation Project⁷⁸

Cooperation between German and American experts is based on an initiative of the former Heads of State Schröder and Clinton in the summer of 2000. They established a German-American Expert Commission to clarify problematic cases of bi-national custody and contact rights (Carl and Walker, 2011: 88). Since then, this Commission has met or held video conferences twice yearly. The aim of these meetings, in which representatives of ministries and central agencies take part, is to support mutual understanding for the interpretation and application of the Hague

⁷⁷ Unpublished report of a visit from Child Focus to reunite International Child Abduction Centre (2011)

⁷⁸ *The German-American Mediation Project*, www.mikk-ev.de

Child Abduction regulations, to expedite on-going proceedings, and to discuss and solve problematic and difficult visitation and custody cases.

Since 2004, representatives of the consular divisions of the US Embassy in Berlin as well as the Consulates in Frankfurt and Munich have taken part in information meetings and trainings on the topic “mediation in international conflicts involving parents and children”. These trainings and information sessions were meant to ensure good networking and cooperation between foreign office employees.

In 2006, a German-American mediation project was developed in the USA by the Office of Children’s Issues at the State Department and by the National Center for Missing & Exploited Children, and in Germany by the Federal Ministry of Justice and the Federal Association for Family Mediation (BAFM). The first meeting of a Mediation Task Force took place in Berlin in February 2006. In October 2006 the BAFM offered a 2-day training for American and German mediators living in Germany. Following this training, a German-American mediator network was established. The project has been administered by MiKK e.V., since its foundation in the summer of 2008.

Germany and the UK – The German-British Mediation Project⁷⁹

The German-British project was begun on the British side by reunite and on the German side by the Federal Ministry of Justice (former Task Force Child) and the BAFM in 2003 and 2004.

For England and Wales the presiding judges for Hague Child Abductions proceedings are located centrally in London at the High Court. They give active support to the idea of mediation. In Great Britain a generous cost support program provides funds for these kinds of mediations.

A particular feature of this program worthy of note is that mediations carried out and financed in cooperation with the reunite foundation can only address the question of repatriation.

⁷⁹ The German-British Mediation Project, www.mikk-ev.de

With the opening of the borders and Poland joining the EU, there has been much more cross-border activity between Poland and Germany, which resulted in an increasing of Polish-German couples, and also an important number of child abduction cases to Poland and to Germany (Carl and Walker, 2011: 91). The German-Polish project was initiated in 2007 by the Head of the mediation division in the German Federal Ministry of Justice, MiKK e.V., the Mediation Office of the European Parliament and the Lower Silesian Mediation Center DOM in Wroclaw (Kiesewetter, 2009). Over 30 active members including judges, lawyers, mediators, representatives of the Ministries of Justice and the central authorities and others took actively part in this project (Carl and Walker, 2011:91). The meetings took place in May 2007 in Berlin, October 2007 in Wroclaw, October 2008 in Berlin, September 2009 in Wroclaw, November 2010 in Berlin, and October 2011.

The goal of this project is the establishment of an active network of mediators to be able to refer qualified bilingual co-mediation pairs quickly and efficiently in cases of child abduction, but also in cases concerning German-Polish custody and visitation conflicts.

The German and Polish mediators took part in trainings in the area of “mediations in bi-national conflicts involving parents and children,” sharing their experiences and working methods.

The Wroclaw Declaration on Mediation of Bi-national Disputes over Parents’ and Children’s Issues was adopted in October 2007 as part of this project. In addition, the Wustrau Declaration was signed in January 2008. Both declarations establish the principles of bi-national, bi-lingual, bi-professional and mixed gender co-mediation in cross-border cases. In October 2008, the Viadrina Declaration established the groundwork for the implementation of mediation in German-Polish conflicts involving children and for the on-going cooperation between the professions involved in these cases.

⁸⁰ *The German-Polish Mediation Project*, www.mikk-ev.de

In 2009, a German-Polish ministerial group was also founded to work on cross-border mediation. This group met for the first time with representatives from both countries in Berlin in December 2009.

In June 2011 the Polish and German Ministries of Justice signed a memorandum of understanding regarding cooperation in relation to cross-border mediation (Carl and Walker, 2011:92).

Germany – Mediation bei Internationalen Kindschaftskonflikten (MiKK e.V.)⁸¹

In 2002 the Bundesarbeitsgemeinschaft für Familienmediation (BAFM – Federal Association of Family Mediation) began a pioneer project in the field of cross-border family mediation. In 2008, the non-profit organization Mediation bei Internationalen Kindschaftskonflikten (MiKK e.V. – Mediation in International Conflicts involving Parents and Children) was founded as a cooperation project between the BAFM and the Bundesverband für Mediation (BM - Federal Association of Mediation), and is active in the field of mediation, providing support, advice and referrals in cases of cross-border child abduction, as well as visitation and custody conflicts. The organization offers services to parents, judges, lawyers, social workers, consular representatives and all other professionals involved or interested in cross-border mediation. MiKK e.V. provides information free of charge and can help in initiating an international mediation.

The mediations initiated by the organization are conducted in co-mediation, with bi-national or bi-cultural mediation team composed by a male and a female mediator who are both from a different professional background. The mediators working with MiKK e.V. have all completed specialized training in the area of international child custody and family mediation. MiKK e.V. has developed a network of over 90 family mediators in Germany, able to provide international family mediation in 19 different languages.

⁸¹ www.mikk-ev.de

MiKK e.V. is the competent organization in Germany for the various bi-national projects involving Germany: the German-French Mediation Project, the German-UK Mediation Project, the German-American Mediation Project, the German-Polish Mediation Project, and the German-Spanish Mediation Project.

*Netherlands – Pilot Project on International Child Abduction*⁸²

From November 2009 to April 2010, a pilot project was conducted in the Netherlands regarding international child abduction under the 1980 Hague Convention. The aim was to shorten the judicial procedure for Hague Convention cases and to introduce the possibility of cross-border mediation in these cases. The Central Authority, the Court the Hague and the Mediation Bureau were involved in the project, which was financed by the Ministry of Justice. The Mediation Bureau was created as an independent section of the *Centrum Internationale Kinderontvoering* (Centrum IKO –International Child Abduction Center), to provide information and support on cross-border mediation in cases of international parental child abduction.

The pilot projects introduced the so-called “pressure-cooker” method and foresees three phases of six weeks really? Or is it 2 weeks to keep within the 6-week limit set? I’m not sure each. The first phase of six weeks is a preliminary phase where the Central Authority deals with the return application and offers the possibility to parents to reach a settlement through mediation. The second phase is a court phase where the judge at the first court hearing has also the possibility to propose cross-border mediation to the parents. The judge also proposes contact arrangements with the child for the time that the left-behind parent is present in the Netherlands. The last phase of 6 weeks is meant for appeal of the decision.

Cross-border mediation can be introduced during the preliminary phase as well as at the first court hearing. The Mediation Bureau organizes, coordinates and registers all official cross-border mediations in cases of international child abduction. They organize all mediations in consultation with the Central Authority or after a hearing at the Hague court. The Center currently has 18 active mediators.

⁸² Bakker, I., Verwijs, L.M., Lünemann, K.D., Olthof, I. & Bruning, M. (2010), *Evaluatie Pilot Internationale Kinderontvoeringen*, Utrecht: Verwey-Jonker Institute, via www.verwey-jonker.nl

Generally, three mediation sessions of three hours each will be scheduled on two to four successive week days, including Saturdays. The mediation will be conducted by two mediators appointed by the Mediation Bureau.

During the mediation procedure the child's voice can be heard. When both parents agree with implementing the voice of the child, the child will be heard by an independent expert, who will write a report of the conversation with the child. This report will be discussed with the parents during mediation.

During the pilot project, 15 cases of international child abduction were dealt with completely. Cross-border mediation was conducted in ten of those cases, from which the mediation occurred in the preliminary phase in four cases, and after the first court hearing in the other six cases. The mediation results are positive: parents reached an agreement on the residence of the child in three cases, and an agreement regarding contact arrangements was also reached in three cases. No agreement was reached in the other four cases.

After the pilot project, the Mediation Bureau continued to work regarding cross-border mediation in child abduction cases. In 2010, 19 cross-border mediations were conducted: a full agreement was reached in 9 cases, a partial agreement was reached in 4 cases and no agreement was reached in 6 cases.

Germany and Spain – The German-Spanish Mediation Project⁸³

Since April 2010 a planning group has been working to initiate and implement a German-Spanish mediation project. The first meeting took place in February 2012 with over 30 participants and the second meeting is planned for the fall of 2013 in Madrid.

5.5.2. Training

⁸³ *The German-Spanish Mediation Project*, www.mikk-ev.de

Besides the above mentioned programs, specialized training regarding international family mediation has already been organized in Europe. In 2005, the Institut Universitaire Kurt Bosch in Sion (Switzerland) launched a specific training in international family mediation. This training was organized in collaboration with several European universities and was the first European Master in mediation. The purpose was to train specialists to make them able to contribute to the resolution of international family conflicts. Participants who successfully finished the training were granted a European Certificate in International Family Mediation. This training was conducted for two years and 25 mediators were trained in 2005 and 2006.

MiKK e.V provides specific training in international family mediation in Germany. This training is organized in the form of a two-day seminar for experienced family mediators. MiKK has conducted seven of these seminars over the past several years and has been invited by the Australian government to do a pilot 4-day training with 28 Australian family mediators in May 2012.

A specific training regarding international family mediation is organized in France by the Institut Régional du Travail Social de Franche-Comté (IRTS Franche-Comté - FR), in partnership with the Swiss organization Groupement Pro Mediation, the Swiss foundation of the ISS, and the Italian organization Il Centro per la Mediazione sistemica “Gregory Bateson”. The training will be conducted during one year, from December 2011 till November 2012, and includes 180 hours with an additional 20 hours of practical experience and dissertation.

5.5.3. Organizations

Several existing organizations on a European level are involved in the field of international family mediation. The *European Forum Training and Research in Family Mediation* was created in 1996 by family mediation trainers from European countries. It is a voluntary not-for-profit professional organization which draws together national, regional and local organizations all over Europe working in the field of divorce, separation and family conflict. The aim of the European Forum is to develop, promote and coordinate training and research in the field of family mediation in order to provide quality standards for the practice of family mediation

in Europe⁸⁴. The Forum gives accreditation only to training programs open to professionals having a double psychosocial and legal background (Vigers, 2006). Several training programs have been accredited by the European Forum, in 14 countries: Austria, Belgium, Germany, England, Scotland, Spain, France, Ireland, Italy, Malta, Poland, Sweden, Switzerland and Israel.

The *Association Internationale Francophone des Intervenants auprès des Familles séparées*⁸⁵ (AIFI) is a network of organizations working in the area of divorce and separated families in French-speaking countries (France, Italy, Switzerland, Belgium, Canada, Luxembourg, Poland, Lebanon,). Their objectives are to promote constructive modes of resolution of family conflicts, create a forum for reflection, exchange and ideas for the actors who work with separated families, and create an international network between these different actors to encourage the sharing of knowledge and expertise. The AIFI developed a good practice guide for international family mediation and mediation at distance, in 2008, for the Permanent Bureau of The Hague Conference. Every two years, the AIFI organizes a seminar on a related topic.

The *European Parliament Mediator*⁸⁶ is an office that can be contacted in international child abduction cases. The main responsibility is to assist the parents in finding the best solution for the well-being of their child. Therefore, the principal goal and duty of the office is to ensure the protection of the children's rights in any dispute involving their parents, by helping the parents themselves to achieve a negotiated solution in the exclusive interest of their child(ren).

*International Social Services*⁸⁷ helps individuals, children and families confronted with social problems involving two, or more, countries as a consequence of international migration or displacement. ISS is active in around 140 countries through a network of national branches, affiliated bureaus and correspondents. Its main areas of intervention are: international family conflicts, family separation prevention, issues concerning child protection in family separation (custody / visiting

⁸⁴ <http://www.europeanforum-familymediation.eu/>

⁸⁵ <http://www.aifi.info/>

⁸⁶ www.europarl.europa.eu

⁸⁷ www.iss-ssi.org

rights and maintenance payments), child abduction, etc. ISS provides assistance through one of its numerous services: cross-border social and legal casework, counseling for individuals and professionals, research and analysis, project management, information diffusion, and advocacy.

5.5.4. The EU Training in International Family Mediation (TIM)

Child Focus, in cooperation with the KU Leuven and the German NGO Mediation in internationalen Kindschaftskonflikten (MiKK) and with the support of the Dutch Centre for International Child Abduction, conducted a two-year European⁸⁸ project on training in international family mediation, from July 2010 until June 2012. The aim was to create a training program concept in international family mediation.

Firstly a research analysis has been done to define the landscape of international family mediation in Europe. Criteria for a training program for family mediators and the model for the training program has been drafted on the basis of this research. The model developed was a bi-national, bi-cultural, bi-lingual and bi-professional mediation model.

In order to validate the concept, a first training program has been organized in September and October 2011. During this 60-hour training, 21 family mediators from as many different Member States were trained in international family mediation.

The secondary component of this project was to ensure the dissemination of the training model across Europe. Therefore, secondary training sessions for family mediation trainers have been organized. During this 80-hour training, 50 future instructors of 26 different Member States were trained.

The final goal of the project was the creation of a network of international family mediators in Europe that will hopefully spread further within Europe. This Network will assist parents in finding solutions that meet with the cross-border character of their conflict. Furthermore, it will be used to help solve international child abduction

⁸⁸ Specific Programme 'Civil Justice' 2007-2013 : JLS/2009/JCIV/09-1AG/0017-30-CE-0350310/00-70.

cases and support all involved professionals in this field. More information on the Network can be found at following website: www.crossbordermediator.eu.

CONCLUSION

Separation and divorce between mixed couples increasingly result in cross border family conflicts involving children, the hardest of all being undoubtedly international parental child abduction. Mediation has proved to be a successful and effective method of settlement of family conflicts resulting in the abduction of the child, mainly because it can facilitate the voluntary and peaceful return of the child as well as reaching a long-term agreement on the residence of the child and on access rights after the return of the child.

There is increasingly agreement that the voice of the child is important and should be heard during mediation. However, what is the best approach to have their voice heard and when their voice should be heard remains less clear. We introduced the concept of 'child inclusive' approach to family mediation practice as an approach and model that aimed to embrace children's concerns and interests in all aspects of mediation. Further we argued that, the difficult question, in each unique, delicate and complex family situation, is how to reach a balance between the rights and obligations both within families, and between families and professionals. The mediator must have the skills, training, and knowledge base, in addition to being comfortable in communicating with children when including children in mediation.

Different languages, different cultures and geographical distance add new and difficult dimensions that need to be taken into account when considering the methodology of mediation. There are several ways mediation models and practice in Europe differ depending on their economic, political, social, and cultural developments, and often also on the influences these countries had from other cultures, theoretical developments and practices.

Culture does not cause conflict, but can exacerbate it, resolve it, transform it, and affect how a person, or the two parents involved in the conflict communicate about it. Similarly, culture will affect the extent of a mediator's intervention, the way a mediator communicates with each parent, and the way a mediator interprets the parent's verbal and non-verbal messages. The 'culture' part of the mediation has only recently begun to be incorporated into mediation trainings. We argued that

mediators cannot be trained to understand all cross-cultural communication, but a mediator can be aware (without being oppressed by the knowledge) of the influences culture has on communication and on the potential resolution of the conflict.

There has been, and continues to be, much enthusiasm for the development of the mediation in the field of international child abduction on the side of the Member States of the EU, other international institutions, and the mediators. EU is aware of the major role that alternative dispute resolution can play in resolving cross-border family disputes involving matters relating to custody and access rights. There have been and continue to be several initiatives, pilot projects, bi-national projects, trainings and organisations in different European countries regarding the use of mediation in cross-border family conflicts, including the TIM project. It remains to be seen how this potential will be developed in the future.

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